

Is there a European law of Human Rights?

*Diversity in the interpretation
and application of the ECHR
by the European organs and
the domestic courts of
the member states.*

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A mis padres y mi madrina,
por su paciencia conmigo
a lo largo de los años,
y también,
a la memoria del Señor Profesor
Doctor don Jérol'd L. Taitz.

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ABBREVIATIONS

| | |
|---------------------|---|
| AAL | <i>Anglo-American Law Review</i> |
| AC | <i>Appeal Cases</i> |
| A-G | Advocate-General |
| All ER | All England Law Reports |
| AJCL | <i>American Journal of Comparative Law</i> |
| AJDA | <i>L'Actualité Juridique droit administratif</i> |
| AJIL | <i>American Journal of International Law</i> |
| Art. | Article |
| BYIL | <i>British Yearbook of International Law</i> |
| CLJ | <i>Cambridge Law Journal</i> |
| CMLR | Common Market Law Reports |
| CML Rev. | <i>Common Market Law Review</i> |
| D. | <i>Recueil Dalloz-Sirey</i> |
| D & R | Decisions and Reports of the European Commission of Human Rights |
| ECHR | European Convention on Human Rights |
| ECJ | European Court of Justice (Luxembourg) |
| ECR | European Court Reports (ECJ) |
| EHRR | European Human Rights Reports |
| EL Rev. | <i>European Law Review</i> |
| Emory L. J. | <i>Emory Law Journal</i> |
| EU | European Union |
| EUI | European University Institute |
| European Commission | European Commission of Human Rights (Strasbourg) |
| European Court | European Court of Human Rights (Strasbourg) |
| EurCtHR (ser B) | European Court of Human Rights - Series B |
| Foro It. | Foro Italiano |
| Ga.J.Int'l & Comp.L | <i>Georgia Journal of International and Comparative Law</i> |
| Giur. It. | Giurisprudenza Italiana |

| | |
|---------------|--|
| HL | House of Lords |
| HRLJ | <i>Human Rights Law Journal</i> |
| HRQ | <i>Human Rights Law Quarterly</i> |
| HR Rev. | <i>Human Rights Review</i> |
| ICLQ | <i>International and Comparative Law Quarterly</i> |
| IHT | <i>International Herald Tribune</i> |
| ImmAR | Immigration Appeal Reports |
| Int'l | International |
| JAL | <i>Journal of African Law</i> |
| JORF | Journal Officiel de la Republique Française |
| La. L. Rev. | <i>Louisiana Law Review</i> |
| LIEI | <i>Legal Issues of European Integration</i> |
| LQR | <i>Law Quarterly Review</i> |
| McGill L. J. | <i>McGill Law Journal</i> |
| MLR | <i>Modern Law Review</i> |
| NILQ | <i>Northern Ireland Law Quarterly</i> |
| NLJ | <i>New Law Journal</i> |
| NQHR | <i>Netherlands Quarterly of Human Rights</i> |
| OJ | Official Journal of the European Communities |
| OJLS | <i>Oxford Journal of Legal Studies</i> |
| PL | <i>Public Law</i> |
| RDH | <i>Revue des droits de l'homme</i> |
| SLT | Scots Law Times |
| Stat. L. R. | <i>Statute Law Review</i> |
| TLR | <i>Tulane Law Review</i> |
| Va.J.Int'l L. | <i>Virginia Journal of International Law</i> |
| Wash. L. Rev. | <i>Washington Law Review</i> |
| YECHR | <i>Yearbook of the European Convention on Human Rights</i> |
| YEL | <i>Yearbook of European Law</i> |

ABSTRACT

This study examines the relevance and consequences of the use of the comparative method as a tool of interpretation of the law of the European Convention on Human Rights and particularly, the capacity of the "transplants" of principles and legal thinking from one tradition to the other to enhance the protection of rights and freedoms. The metaphor of "transplants of laws" is proposed to depict more clearly the complexities of transfers and borrowings between various systems of protection.

The work is guided by the question: "Is there a European law of human rights?" The affirmative answer is qualified by the existence of overlapping systems and remedies which affect ECHR construction. The comparative method is used, therefore, to bring to light the effect of these pressures in specific cases. The consequences of the dynamic interpretation, the doctrine of the margin of appreciation and the supranational judicial review of member states' actions are also addressed. There is a limited inquiry into the drafting of the ECHR and into the protection of human rights in the EU system from the point of view of the same comparative method. In addition, the effect of the ECHR in three countries (with civilian, common law and "mixed" legal systems) is studied.

It is the conclusion of this work that the strain produced by a multiplicity of systems on interpretation is turned to positive protective use with the help of the comparative method and this, in turn, improves the protection of the individuals. Further reliance on the method can assist the European organs in the refinement of their interpretative tools. As a result, a more harmonised protection of human rights emerges which is easier to share by different legal systems, although without becoming one single system of protection.

I, Danilo A. Leonardi,
certify this dissertation
to have been composed by myself
and to be my own work.

Introduction

*[A European Court of Human Rights]
in no way challenges the authority
of the world court, but it may well
be that the principles laid down by
the United Nations will be better
and more effectively interpreted by
courts in the more limited and
homogeneous area of regional units:
Let Europe judge Europe.¹*

This dissertation is an investigation into the interpretation of the European Convention on Human Rights (ECHR) and its Protocols by the Strasbourg institutions and the judges of the member states. Specifically, it is concerned with the legal rules of human rights and how they convey their meaning. It examines, therefore, legal interpretation with a special emphasis on the comparative analysis of the case law of the European Court in Strasbourg and of three domestic jurisdictions, France, Italy and the United Kingdom. A comparison of their different approaches will be examined concentrating in the use of the comparative method as a tool of interpretation in the adjudication of human rights and as a means of assessing the work being done by the European and domestic courts. In addition, this study will examine the prospects for harmonisation and Europeanisation of standards of protection in the area of human rights.

These issues are mainly treated by the examination of data resulting from inquiries into, (i) the European and domestic case law on human rights, (ii) the existing literature on the subject, and (iii) the activities of those involved in one way or another in European human

¹Sir Winston S. Churchill, "Council of the European Movement. A Speech at the Salle des Beaux Arts, Brussels, 26 February 1949", in: In The Balance. Speeches 1949 and 1950 by Winston S. Churchill ed. Randolph S. Churchill, (1951), 28.

rights adjudication or litigation, such as judges of the Strasbourg Court, staff of the Council of Europe and practitioners, by means of interviews which provide additional first-hand information.

With regard to the layout of this introductory chapter, it opens with a statement of the topic of the dissertation, followed by a discussion of the vocabulary and the domain of study and its subjects. There follows a list of the questions to be looked at and a discussion of the methodology used to examine them. Finally, it closes with the general structure of the dissertation, which provides the categories necessary to organise the evidence collected in order to enable conclusions to be drawn.

The topic of the present study

The topic of this thesis is based on the civilian and common law influences underpinning the development of the European Convention on Human Rights law and mechanisms, and is focused on their effect on the interpretation of the Convention and its Protocols at the European Court of Human Rights in Strasbourg and in France, Italy and the United Kingdom, and the consequences of the evolution of common standards in human rights law and case law for the creation of a shared system of European public law.

The vocabulary

In this work, the European Court of Human Rights in Strasbourg is referred to as the "European Court" or "Strasbourg Court" and the European Commission of Human Rights, also with its seat in Strasbourg, as the "European Commission." Unless stated otherwise, neither of these two expressions (European Court and European Commission)

refers to the two organs of the European Union system that bear a somewhat similar designation, namely the European Court of Justice in Luxembourg and the European Commission in Brussels. In this study, therefore, the European Court of Justice of the European Union will be referred to as the "ECJ" and the "Commission of the European Union" will be referred to as such or as the "Commission of the EU". The European Union itself will normally be addressed by its full name or by the acronym "EU." The expression "European Union law" will be addressed as "EU law" in the understanding that the expression European law covers a much wider field than the law of the EU, i.e. it also includes, among other things, the ECHR, its Protocols and the human rights system discussed in this dissertation. The acronym "A-G" after a surname stands, as is well known, for "Advocate-General" before the ECJ. If, however, the reference is made to the EU or its organs in a pre-Maastricht Treaty situation, the (old) acronym "EEC" will be preferred.

On the other hand, the expression "member state" will be applied to the High Contracting Parties of the Council of Europe, unless stated otherwise. Again, in order to avoid confusion with the European Union system, those countries which are part of that system will be collectively designated with the phrases "EU member states", "the member states of the EU" or as "EU countries." (Those expressions in singular, of course, will mean that only one member of that system is being referred to.)

In addition, as is also well known, the acronym "ECHR" refers to the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms), however, in this dissertation, unless stated otherwise, it refers to the Convention itself and its Protocols. When the expressions "Convention law" or "law of the Convention" are used, the

reference is to the aggregate of the ECHR, its Protocols, the appropriate procedural rules and the European Court's case law.

The domain of study

The purpose of this section is to put the topic and the eventual findings in proper perspective. Among the vast number of aspects that could be considered in a study on human rights, this dissertation concentrates on the civilian and common law influences on the system of the ECHR as a whole and on legal interpretation both in Strasbourg and in the member states. Many other important aspects of the Convention have had to be left out, for example, the impact of the Convention system on domestic law and its potential to spur on legislative or policy changes. The focus of this dissertation should therefore be seen as only one of the many and various issues that could be studied.

In addition, it is accepted that there might well be a gap between whatever progress is made in the legal aspects studied here and those violations that slip through the net of protection - i.e., the grave problem of whether there is actual protection of human rights on the ground.² The sole fact of some violations not reaching the European organs (or even the legal system of a member state for that matter) should not be taken as an indication that

²See, *inter alia*, the case before the European Commission of Human Rights: *France, Norway, Denmark, Sweden, the Netherlands v. Turkey*, 9940-9944/82, 35 D & R 143, concerning violations of human rights in mainland Turkey. The other Turkish case concerned serious violations committed by the Turkish armed forces in Cyprus. Although the European Commission established the violations, the Committee of Ministers "had taken note of the Report of the Commission as well as of the memorial of the Turkish Government and found that events which occurred in Cyprus constitute violations of the Convention" and diplomatically urged inter-communal talks under the auspices of the Secretary-General of the United Nations avoiding a direct decision on the breaches.

they do not exist;³ unfortunately redress simply does not result in those instances. At any rate, unlike the situation in other times or in other parts of the world,⁴ the present tendency in (Western) Europe is to conform to the rule of law and to honour (albeit reluctantly sometimes) Strasbourg findings; it is suggested that this characteristic gives us room to study the legal aspects of the system without producing too much of a one-sided and legalistic picture. Moreover, the Council of Europe, unlike the United Nations human rights institutions, does not have to attempt answers to the conundrum whether human rights standards are universal or whether they mainly reflect Western notions of justice and individual freedom.⁵ The member states of the Council of Europe, despite the differences between their legal and political systems, are all agreed on the fact that fundamental freedoms "are best maintained on the one hand by an effective political democracy and on the other by common understanding and observance of the Human Rights upon which they depend" because these countries "are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law."⁶ Admittedly, the language of the Preamble to the ECHR may be a touch

³Conversely, the poor record of Italy and the United Kingdom in Strasbourg should not lead us to jump to the conclusion that human rights are completely disregarded in those countries. The issue is more subtle, as Françoise Hampson put it very well regarding the United Kingdom: "Whilst the United Kingdom is not guilty of the gross and systematic violations of human rights found in so many states, that is hardly relevant. It has agreed to be judged by Western European standards." Françoise Hampson, "The United Kingdom Before the European Court of Human Rights", (1989) 9 YEL 121, 173.

⁴See, for example, Antonio Cassese, Human Rights in a Changing World, (1990), 121, where he addresses the problem of violations of human rights in the world. Among other case studies, he urges us to draw lessons from the failures in Argentina in protecting human rights against violations in the period mid-1970s to the 1980s in the context of a fight against terrorism: "A brief consideration of what happened in Argentina may throw some light on this complex of problems; it may perhaps also provide lessons for the future (lessons that will obviously apply only to the extent to which we succeed in being guided by rational choices and not by emotional impulses and pressures)."

⁵"Human rights were born in the West, they bear the hallmark of Western culture and express Western concepts" although their enjoyment should not be limited to western people nor are the exclusive creation of Europeans, argued M. Badinter, the "General Rapporteur" at the Colloquy on "The Universality of human rights in a pluralistic world", Strasbourg, 17-19 April 1989, Final Report, Document H (89) 3, page 3.

⁶Preamble to the ECHR.

grandiose, however, in the world at large, differences between the countries are much more pronounced than in (Western) Europe, especially since "the primacy of the individual is not accepted universally."⁷ As the United Nations Secretary-General observed, there is still much to be desired as regards protection and for example, the discussions at international conferences or, we should add in our case, a debate on legal interpretation, should not distract us from seeing the difficulties in the safeguarding of freedoms and liberties:

At the World Conference on Human Rights, which will open in Vienna on Monday [June 14, 1993], member states of the United Nations will convene with governmental and non-governmental organizations and human rights activists. As this gathering takes place, we must not lose sight of the people who are its purpose: the writer who fears the state, the mother who sees her sons' and daughters' lives and prospects frustrated by bureaucrats, the villager who knows that a beating - or worse - lies in store for him.⁸

Not only could many other examples be added, but a glance at the press and other sources will inform us of actual and potential violations of human rights even in some of the member states of the Council of Europe.⁹ Nonetheless, a "realist" description of human rights protection also fails to cover all sides of the issue. For one thing, as it has been written on inferring causal relationships between human rights and economic growth, no single social accounting scheme is unquestionably effective for the measurement of human rights protection, "Existing measures

⁷Stanley H. Naismith, The International Protection of Fundamental Human Rights: An Examination of the Role and Effectiveness of International Law in the Elimination of Torture, Ph.D dissertation, University of Glasgow, (1988), page 1 of the conclusion.

⁸Butros Butros Ghali, "Democracy, Development and Human Rights for All", IHT, June 10, 1993.

⁹Regarding human rights protection "on the ground", in addition to the cases mentioned above, the failure of Turkey to meet European standards played a part in the negative answer of the EC Commission to that country's 1987 application for European Community membership. It was indicated, among other reasons, that its treatment of prisoners, workers, citizens and minorities (such as the Kurds) were not on a par with accepted EC standards. See: David Buchan, Europe: The Strange Superpower, (1993), 119.

are not only highly suspect in terms of their reliability, validity, and equivalence, but were designed to fulfill a different purpose: very gross comparisons of states' repressiveness ..."¹⁰

Whatever the case, the power of the law to improve the protection should not be underestimated in the "more homogenous" European context. This dissertation therefore proceeds in the conviction that the availability of a legal benchmark in Europe, the ECHR system, against which national practices can be measured (and then, if necessary, modified) in a context of further control over state action is of substantial importance for the respect for and protection of human rights. Notwithstanding the above, it should not be forgotten that human rights judgments at a supranational court (or at any court for that matter) are shaped by many elements, therefore, their outcome cannot be completely explained in terms of legal interpretation alone nor a study of interpretation would allow us, for example, to predict the outcomes.

The objective of this study

This dissertation is a study of the relationship between the Western legal traditions, the interpretation of human rights law and the legal systems of the member states, and the control of state action by supranational organs leading to an improved human rights protection. The research seeks to find and identify difficulties in interpretation that may bring about an unsatisfactory protection of human rights when several legal orders come in contact. The adopted approach will enable us to place the topic of protection of human rights within a wider framework of public law that is becoming increasingly

¹⁰Russel Lawrence Barsh, "Measuring Human Rights: Problems of Methodology and Purpose", (1993) 15 HRQ 87, 121.

European in the sense that the Convention system is striving to establish an *ordre public européen*.¹¹ The topic may give clues to discover trends on the future of public law in Europe - which might be used to remedy shortcomings - and would contribute to the understanding of some aspects of litigation at a supranational level. The methodology, on the other hand, points to the usefulness of comparative law as both a tool of interpretation in the European Court and a means to perform this investigation.

The research will also bring together sources from a variety of jurisdictions. It will use a vocabulary (transplants of laws, "incoming tides", infiltration and so on) in an attempt to produce a mental image to help in the understanding of the complex relationship between the European and the domestic legal systems of a supranational organisation which are pulled by the pressures towards further Europeanisation and uniformity on the one hand and the respect for diversity and national differences on the other. In addition, the choice of France, Italy and the United Kingdom, as the domestic jurisdictions to be studied has been made on the basis of a comparative approach because of the connections of these countries with the two Western European legal families. Likewise, the inclusion of Scotland as a mixed law jurisdiction (of the two legal families) adds another dimension to this work.

Admittedly, the judicial function of the Court of Human Rights (and other courts addressed in this study) can be analysed from the different perspectives of a lawyer (and thus, focusing on processes or legal rules and their interpretation), a political or social scientist or a historian. This dissertation concentrates on questions of

¹¹A. Z. Drzemczewski, European Human Rights Convention in Domestic Law: A Comparative Study, (1988), 19.

legal interpretation of Convention law. Other aspects will be mentioned only in parentheses if they give insight to the topic.

The questions asked in this dissertation

The questions in this dissertation were prompted by a series of observations on human rights legal interpretation which were required to venture an answer to the question in the title: Is there a European law of human rights? A series of provisional and necessarily incomplete explanations will be put to the test. The reasoning began with the perception that despite the presence of the high-profile Strasbourg mechanism, there was considerable diversity in the interpretation and application of the ECHR throughout the member states, to the extent that a straightforward answer to the question could not be easily provided. Rather, it prompted another question: Are there several systems of European human rights law or just one? The law applied to human rights cases in Europe is interpreted in the midst of a tension between the diversity among the member states and the magnetism of the archetype of one single European system of protection, which are two strong forces pulling the process of decision making in opposite directions.

The observation that legal interpretation and the assumptions and tendencies vary from one legal system to another suggests the need for a comparative examination to study the pull of diversity. A weakness of the Strasbourg system was readily observed: the system was cast in the mould of a traditional international organisation established between sovereign states. Not surprisingly, it had no device to stop the member states from invoking the defence of the reason of state or derogating from their obligations. Another weakness which will be studied is

the weak control over future cases as result of handling its own case law as *jurisprudence constante*, as is the case in civilian jurisdictions.

The allure of one single European law of human rights is another force to be reckoned with. The question is whether the (hypothetical) arrival at such a single system of protection would mark a success for this organisation. The decision to vest individuals with the right of direct access to an international machinery put the European governments under important obligations and determined a degree of erosion of their sovereignty as the European organs became involved in the "mighty problem" of judicial review of member states' actions. The "countermajoritarian" dilemma of judicial review will be addressed. Moreover, the open-ended rules of the ECHR require a great deal of (actualising) interpretation and the incorporation of goals such as the due respect for the dignity of the human person that the European guarantee was created to uphold. A study of the margin of appreciation afforded to the respondent governments in relation to the "European consensus" and the surveys of the state of the law in different member states will be provided.¹² The breadth of the margin of discretion appears to depend on factors such as the nature of the right and its restrictions, the type of issue of the case and the obligations assumed by the member state concerned. Sometimes it is wide enough to let the member states act independently, but on other occasions the European organs

¹²R. St. J. MacDonald, "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights" in: Andrew Clapham and Frank Emmert (eds.) Collected Courses of the Academy of European Law, 1990 Vol. I-2, (1992), 95. On the doctrine of the margin of appreciation, see also: Walter J. Ganshof van der Meersch "Le caractère "autonome" des termes et la "marge d'appréciation" des gouvernements dans l'interprétation de la Convention européenne des Droits de l'Homme" in Protecting Human Rights: The European Dimension: Studies in honour of Gérard J. Wiarda, F. Matscher and H. Petzold (ed.), (1988) and Thomas A. O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", (1982) 4 (4) HRQ 474.

seem to keep interpretation firmly on the path towards further uniformity.

The environment of many kinds of legal systems where interpretation takes place adds to the complexity of the situation and suggests the question whether a minimum of uniformity in legal interpretation is required to achieve a consistent protection of human rights. Comparative law can be used as a tool of study and of interpretation therefore it will play a double role in this dissertation. Despite the approximation that has been taking place between the legal systems, those still differ in some fundamental aspects, and as a consequence, it is possible to use their differentiating traits in the search for the influences of the legal traditions on the system of the Convention.

Another issue to be looked at is the situation of the ECHR in the selected member states. Do their judges (perhaps spurred on by litigants and their lawyers) look to Strasbourg for interpretative guidance? It may be necessary to resort to a double methodology of statutory interpretation in those jurisdictions that routinely carry out a restrictive interpretation of domestic statutes, such as the common law jurisdictions, in order to avoid a dilution of the protection.

The system of the Council of Europe is one of the various systems of protection of human rights that exist in Europe,¹³ and it overlays its human rights law

¹³In addition, all the member states of the Council of Europe, with the exception of Switzerland, are members of the human rights system of the United Nations, which is based on the operation of the United Nations Charter in the hands of a political organ, the Human Rights Commission. This Commission has pursued the setting of standards, the drafting of instruments, such as the Universal Declaration of 1948 and the International Covenants of 1966, subsequently adopted by the General Assembly of the United Nations. Besides, other organisms and instruments are also in operation, such as the International Covenant of Civil and Political Rights which created the Human Rights Committee. Another example is the International Covenant on Economic, Social and Cultural Rights that is supervised by the Economic and Social Council of the United Nations (ECOSOC) which established a Committee on Economic, Social and Cultural Rights.

interpretations on others furnished by the systems already in place. The assorted legal systems of the member states and also the EU play their different parts in this protection. The question of interpretation in all of these systems is relevant because the application of the ECHR does not rest entirely on what could be accomplished in Strasbourg. The functions of the Strasbourg interpretation, as with the work of its organs, are rather of a supplementary nature. In this (restricted) sense it may be possible to use the term "subsidiarity."¹⁴ National courts appear to be crucial to enforce civil rights, and make both the law givers and the administration comply with them. Strasbourg offers the possibility of a different (although not necessarily "better") balance of the interests at stake in a case. At the bottom of this is the paradox of international human rights in general: states are at the same time the perpetrators of the violations and on the other hand, the authors and addressees of international norms on how to treat people within their own jurisdiction.¹⁵ International (or supranational) organisations can only provide a remedy after states have had a chance to put matters right.¹⁶

This organ has promoted human rights through various mechanisms of protection, and examined, reported and publicly criticised some flagrant violations. Other systems of protection under the auspices of the United Nations include that established under the Committee on Elimination of Racial Discrimination (CERD), the Committee against Torture (CAT), and also, the Committee on the Elimination of Discrimination against Women (CEDAW). In addition, a number of Conventions and Recommendations have been sponsored by the International Labour Organisation (ILO) and the UNESCO (United Nations Educational, Scientific and Cultural Organisation). See, for example: Asbjørn Eide, International Protection of Human Rights, Publications and Documents Division of the Council of Europe, (1989), 29 and 30.

¹⁴On the other hand, in European Union law and very simply put, "subsidiarity" means that decisions should be taken at the lowest appropriate level: the EU would take action only if and in so far as a proposed action cannot be sufficiently achieved by the EU member states and could be better achieved by the EU. "Subsidiarity" applied to the system of the ECHR is therefore a different form, meaning "secondary" or "ancillary" with regard to the protection of rights and freedoms offered by the member states.

¹⁵Jack Donnelly, "International human rights: a regime analysis", (1986) 40 International Organization 599, 616.

¹⁶See Article 26 ECHR: "The Commission may only deal with the matter after all the domestic remedies have been exhausted (...)."

In addition, the persistence of the Strasbourg system suggests that it offers, or may be in a position to offer, a benefit to the people of Europe in protecting their rights and holding their governments accountable. This trend underlines the need for the judiciary and the lawyers of the member states to understand and use both domestic and European law.

The methodology

The difficulties presented by the subject involve, as Mireille Delmas-Marty wrote, "penser et ordonner le multiple sans pour autant le réduire à l'unité ou l'abandonner à la dispersion."¹⁷ Her idea will guide this work.

The anticipated methodology involves studying the adjudication process of the European Court and the practices of the other Strasbourg organs (if relevant) through an investigation into the case law, examining legal interpretation in order to determine whether there is one system or are several systems of protection, what their mutual relationships are and what effect they have on the substantive law of the ECHR and how the protection of human rights fares in such a contrasting environment. The study of primary sources involves the scrutiny of Strasbourg¹⁸ and domestic case law with a particular point

¹⁷Mireille Delmas-Marty, *Le flou du droit*, (1986), 12.

¹⁸The Strasbourg Court case law can be found in the *EHRR* (European Human Rights Reports), Series A (European Court of Human Rights, Judgments and Decisions), Series B (European Court of Human Rights, Pleadings, Oral Arguments and Documents), *YECRH* and in other reports. With regard to the Commission, its case law can be obtained from *D&R* (European Commission on Human Rights, Decisions and Reports), in the Collection of Decisions of the European Commission on Human Rights, as well as in *EHRR* and other accounts. The *Digest of Strasbourg Case-law relating to the European Convention on Human Rights* includes references to European Court judgments; reports, opinions and decisions on admissibility of the European Commission and resolutions of the Committee of Ministers of the Council of Europe (under Articles 32 and 54). It contains extracts (from all those sources, published and unpublished), arranged according to the articles of the ECHR and its Protocols. It is periodically updated. Besides, the CEDH (*Centre d'études des droits de l'homme*), a specialised section of

of view, that is, looking for the encounter of the legal traditions and their effect on interpretation. The comparative approach adopted in this dissertation will be discussed in Chapter 2 and further developed in Chapter 7.

Added to that, there is an apparent paradox in the picture that first comes out of a listing of the case books as it may make us wonder whether it is not obvious at this point already that there is one European "common law" of human rights, created by the European Court of Human Rights, shared by all the member states of the Council of Europe and which is more or less contained in all of these primary sources. But even these sources alone disclose that this is an extremely simplified depiction. The closer we look at the case law, the more clearly its complexities stand out and a simple answer becomes more and more elusive. This understanding is reinforced by how the ECHR is applied (or not) in domestic law. The scrutiny of the texts of the relevant cases will proceed, therefore, by looking at the appropriate domestic case law of the United Kingdom, France and Italy. Although the investigation will discuss the position of the ECHR in relation to municipal law, the main concern will be to establish the ability of the ECHR to influence domestic legal interpretation. In addition, there will also be a study of the underlying reasoning in the case law of Strasbourg and a very brief inquiry into the discussions that led to the creation of the Council of Europe and particularly, the debates in the run-up to the ECHR.¹⁹

the Library of the Council of Europe in Strasbourg, keeps a comprehensive catalogue on published material on European human rights organised according to the articles of the ECHR and its Protocols.

¹⁹The "Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights" is a bilingual (English/French) publication and is a reproduction of those debates in chronological order. The indexes are found at the end of each volume and refer only to that volume, most often in the form of references to the individual speakers without mention of the articles of the ECHR in its final shape.

For an analysis of interpretation that might answer our main question, a review of the human rights cases will be performed in the light of the comparative method and the findings will be discussed with help from the evidence provided by secondary references. Further data on interpretation as influenced by the legal traditions in Strasbourg and in domestic law and the characteristics of domestic interpretation will be gathered from supplementary sources (many of these sources are publications, official documentation, and so on) and the transcripts of some interviews.²⁰ With regard to the latter, and despite similarities in the questions asked, these were not part of a set inquiry designed to be used in, say, statistical survey research. Most of the interviewees were asked open-ended questions on the complexities of their work, and since each had a different area of speciality, the queries became more focused by the end of each interview and, indirectly, in successive interviews made with their colleagues. The questions concentrated on what they did and observed, since they were the people directly involved in the processes.²¹ The goal was to complete some of the information already obtained from other sources, to have a more complete picture of the actual work performed at Strasbourg, and to see (if possible) some tendencies into the future.

²⁰The interviews were conducted in a study visit to Strasbourg in September 1992, and also, in London, The Hague, Leiden and Paris on other occasions in 1992 and 1993. The practitioners, judges and officials interviewed in those opportunities requested their identities be kept off the record, however. The information, rather than being quoted and attributed, was used to derive insights to help the research performed on other sources. The technique proved valuable to see the other sources under a different light.

²¹Each interview was conducted relying on a memorised tentative order of topics and subtopics to cover, which concentrated on, but was not limited to, the interviewee's opinions from the bench or his or her particular position in or before the machinery, on the encounter of the civilian and common law traditions in the cases heard at Strasbourg in terms of the interpretation of the substantive law and in the way cases were handled procedurally. The questions usually moved on to the point where the interviewee was asked whether he or she thought that the work of the Strasbourg organs amounted to the hatching of a European law of human rights, and if so, whether it synthesised the civilian and common law traditions of the member states in some measure. In general, a "teach-me approach" was followed for the reason that "if the interviewee believes he can teach you something, he is more likely to reveal more about the intricacies of his activities." (Aaron Wildavsky, Craftways: On the Organization of Scholarly Work, (1989), 69.)

Finally, the vocabulary to be used could be considered as part of the methodology for the reason that the metaphors such as transplants of legislation, imports and exports of laws, impact of legislation, autochthony, home-grown legislation, tensions, and so on are resorted to in order to help us understand some of the intricacies of this complex area of the law. The subject is developed in Chapter 2.

The structure of the dissertation

This dissertation is mainly a study of the interpretation of the law of the ECHR in a complex environment of multiple legal systems. The structure will guide the reader through the different aspects of attempting an answer as to whether there is a European law of human rights. If the answer is in the affirmative, then other questions follow, such as where the European law of human rights is and whether it is interstitial law, with a multiplicity of systems overlapping and taking care of human rights protection in different ways or, on the contrary, whether a single body of law has been developed.

The focus on the Strasbourg system provides us with a perspective from which to see the legal hold of the ECHR in different jurisdictions and place the issue of the protection of human rights within a framework of an increasingly Europeanised public law. Europeanised means internationalised in this context, because individuals do not stand alone against their governments any longer as they can resort to a supranational forum which can place limits on the power of the governments.

The dissertation is divided into five parts. It opens with the section entitled "The framework of the analysis" which is subdivided into two chapters. Both of them deal

with background and methodological questions. The present chapter is followed by Chapter Two, which will address the metaphor of "transplants of laws" coined several years ago to explain situations in which laws were "borrowed" from a legal system and "incorporated" into another. The purpose is to attempt to make it easier to picture in the mind's eye the complexities and intricacies of the operation and interactions of the overlapping systems of protection. It will be argued that the coming into contact of various legal systems constitutes an extremely important aspect of interpretation in Convention law and thus, explain the need of comparative law as a tool of interpretation. The experience of mixed jurisdictions such as Scotland²² will help us define the method of study. The reader will be reminded that this dissertation is not concerned with a study of impact of laws, and a section of the chapter will (concisely) consider this issue.

Part Two is termed "The interpretation of the ECHR by the domestic courts" and will insist on the importance of the protection in domestic law first. Chapter Three will analyse these issues, and will take up the question of the domestic status of the Convention in France, Italy and the United Kingdom. The courts of the member states are largely responsible for the observance and enforcement of human rights law within their national jurisdictions. The Convention's law and case law will be pictured as imported law entering the domestic jurisdictions and producing various legal effects. The ECHR, however, does not cover an area of the law completely denuded of domestic provisions. The contracting states were no legal *tabulae rasae* when they signed up for the ECHR. The attitudes of national courts vary considerably from country to country.

²² Relevant works, among others, are the following: T. B. Smith, Studies Critical and Comparative, (1962), particularly the chapter: "The Common Law Cuckoo: Problems of 'Mixed' Legal Systems with Special Reference to Restrictive Interpretations in the Scots Law of Obligations", 89, and Liana Fiol Matta, "Civil Law and Common Law in the Legal Method of Puerto Rico", (1992) 40 AJCL 783.

Part Three, entitled "Decision-making and interpretation in Strasbourg" will unfold the discussion over the interpretation of Convention law in Strasbourg. Chapter Four will conduct a limited inquiry into the circumstances leading to the drafting of the ECHR to look into the tensions between the diversity of national legal systems that came into contact and the aspiration to set down in writing some universal principles applicable throughout Europe. The presence of political factors will also be acknowledged. Chapters Five to Ten will change the focus and offer a comparative re-examination of the means of interpretation used in the adjudication of human rights cases by a supranational court.

Chapters Five and Six will weigh the textual, contextual and teleological interpretation of the ECHR at Strasbourg. Specifically, they will look at the interpretation process and discuss the significance of an actualising interpretation vis-a-vis the open-ended articles of the ECHR. The inquiry will also highlight the form and layout of the decisions in order to set up the background for the comparative analysis of Chapters Seven to Ten. The study will therefore feature a comparative analysis of the jurisprudence of the Court, defining with further precision the comparative law method and providing examples of the encounter of the traditions and its effects on interpretation and the final outcome of the cases. Although it will be recognised that several factors come into play at the moment of determining the outcome, it will be argued that a reasonable interpretation of the law of the Convention, which is placed at the cross-roads of legal orders, can be reached by reliance on a comparative technique in addition to a "dynamic" and "actualising" interpretation "in the light of present day conditions." It will also be recognised, particularly in Chapter Seven, that the Strasbourg system

draws on the legal concepts and principles of national legal orders. The idea of a tension between diversity and uniformity in Convention law will pervade the discussion. More specifically, it will be argued that a paradox lies in this tension, on account of the failure that a complete success in establishing a single system of human rights might bring about. Heterogeneity is needed as a source of inspiration in Convention law, and the comparative method is a way to put diversity to use.

Part Four is entitled "The EU and human rights." It contains one chapter, Chapter Eleven, which will look briefly at the interpretation of the ECHR under EU law. Comparable to the system of the EU, the Strasbourg mechanism is an international system that puts in contact the domestic systems of the member states and a supranational organisation. The similarities with the EU range from some aspects of the procedure before the Court to the import and export of laws, to the harmonisation of laws and so on. The harmonisation carried out by the ECJ has to face the dilemma of choosing between an ever growing uniformity and a space for each member state's own public policies. The differences between the systems and the point that the protection of human rights in the EU system is completely subordinate to the existence of an EU right will also be addressed.

Finally, Part Five closes the dissertation asking again the question "The European law of human rights, one system or several?" in order to sum up the findings and spell out the conclusions in Chapter Twelve. The system of the ECHR will appear as unfolding its potential to achieve harmonisation of the legal systems of different countries and the tension between the aspiration to uniformity, which is implied in the question of the title of this dissertation, and the acknowledgement of diversity, which is accepted in its subtitle, will be referred to once

again by trying to show that interpretation of European human rights law is made in an contrasting environment permeated by legal diversity.

A metaphor for the operation of human rights law in Europe

Even where the population is much like that of Britain, a transplanted British institution will probably grow in a different manner because the soil is different²³

To the mass of Americans resident in the island [of Puerto Rico] - and this is particularly true of the lawyers - the entire system of law and government, of domestic and public institutions, was bad simply because it was different from our own ... The only way to make Americans of the Porto Ricans, it was argued, was to give them, without delay, the system of law of one of our States.²⁴

Introduction

This chapter is a theoretical discussion concerned with applying the metaphor of "transplants of laws" (coined several years ago to explain situations in which laws were "borrowed" from a legal system and "incorporated" into another) to the relationship between the Human Rights system of the Council of Europe, the member states and also, the protection of human rights in the system of the EU. A definition of the expression "legal transplants" will be provided and then the terminology used in the

²³Sir Ivor Jennings, The approach to self-government, (1956), 33.

²⁴Manuel Rodriguez Ramos, "Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico" (1948) 23 TLR1, 18, quoting from Leo Stanton Rowe, The United States and Porto Rico, (1904), 14.

literature and this dissertation will be briefly discussed. Later, the relationship between laws and "soils" will be addressed, especially as regards the dominant role of the national legal systems in the protection of human rights in comparison with the secondary role of the law of the ECHR. In addition, the issue whether harmonisation can co-exist with diversity will be addressed. Finally, the issue whether estimates of Convention compliance by the member states are taken into consideration by the European Court in the decision-making process will be addressed.

"Legal transplants"

Before we consider the interpretation of the transplanted law of the ECHR in operation in domestic law, in Strasbourg and in the system of the EU, a definition of the metaphor of "transplants" in use is in order. The metaphor is a way of thinking abstractly adopted by some writers. Stated at a very high level of generality, an act of legal transplantation can be defined as the "borrowing" of laws or case law from another system for their transference to a host legal order. It is comparable to the action of uprooting a plant from the ground where it grows in order to plant it in another place, or the act of transferring tissues or organs to implant them in another part of the same or another human or animal body. If the transplanted law does not fit in its new "environment", the situation is compared to a "rejection" as the recipient body refuses to accept the transplanted tissue or organ. Finally, if the law is not (outrightly) "rejected" but its operation is modified by the recipient body of law and case law, the comparison is

with a biological transplant that turns out differently.²⁵ Likewise, a European law of human rights is imported into the member states' legal systems, but unlike those biological examples the "transplant" can take place without uprooting the borrowed law from its "home" legal system. There might also be rejections and differences in the way it "grows."

Terminology of "legal transplants"

A brief review of the literature reveals that there is some connection between the terms used and the reach or size of the sort of "transplant" they address. They provide an assorted list of terms, which coupled with the dissimilar causes that may prompt a "transplantation of law" (not the least of them political), the various ways in which it can take place and the different agents involved, helps explain the presence of ambiguities in the terminology. The ambiguity is no reason, though, not to resort to them as long as a clarification of their scope is provided. The terms range from the weak words "influence" or "infiltration", which suggest a limited penetration of foreign law, to the strong noun "reception" capable of conveying the idea of a massive invasion, such as the Reception of Roman law in Europe. In other languages, for example French, there is also a hierarchy in the terminology which extends from the weak noun *influence*, to the strong terms *pénétration* or *réception*. Similarly, the German language is no exception to this rule and the terms range from the weak *Einfluß* (influence) to the strong expressions *Rezeption des römischen Rechts* (reception or adoption of the Roman law), or *Aufnahme des Fremdsrechts* (reception of foreign law), and in those

²⁵It is difficult to separate the notion of "rejection" from the fact that it may take a long time for a law to turn a "law in the books" into "law in actual operation". Alan Watson, "Legal Transplants and Law Reform", (1976) 92 LQR 79, 83.

cases where the transplantation of the foreign law has been substantial, the verb *eindringen* (to enter, to invade, to intrude, to penetrate) appears suitably graphic.²⁶

In this dissertation the metaphor of (biological) "transplants" is mixed with the figure of an "incoming tide". The idea of a "tide" is another way of conceptualisation, but the mix between the two has not been whimsical. Rewording Roland Bieber's way of putting the relationship between the EU legal order and the member states, the terms "incoming tide" refer both to a relationship between legal systems and to their mobility.²⁷ The metaphor of a "tide", of course, is borrowed from Lord Denning in *H. P. Bulmer v. J. Bollinger SA*,²⁸ where he applied it to the penetration of European Community law in English law, as follows: "But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers." The boundaries between the law of the Convention and municipal law are in constant change. As "water", it can "spill" its principles over existing law²⁹ and its standards can "soak" even those areas which did not appear directly affected by the Convention when it was signed. In fact, Lord President Hope pointed out that the ECHR has expanded its role and covered more "terrain" than that contemplated at the moment of ratification, as the

²⁶Jean Gaudemet, "Les transferts de droit", (1976) *L'Année Sociologique* 27.

²⁷Roland Bieber, "On the Mutual Completion of Overlapping Legal Systems: The Case of the European Communities and the National Legal Orders", (1988) 13 *EL Rev.* 147, 147.

²⁸[1974] 1 Ch. 401, 418.

²⁹Rudolf B. Schlesinger et al. pointed out that the rights of the ECHR can exercise a "radiation" effect on private law relationships and have been cited in courts in disputes between individuals (e.g. whether a particular contractual provision violates public order). See: Rudolf B. Schlesinger, Hans W. Baade, Mirjan R. Damaska and Peter Herzog, Comparative Law: Cases - Text - Materials, (1988), 729/30, footnotes 8a, 8b and 9. Also, this issue (named "Drittwirkung" in German constitutional law) has been addressed by Andrew Clapham in: The privatization of European Human Rights (1993) and by E. A. Alkema, "The third-party applicability or "Drittwirkung" of the European Convention on Human Rights", in: F. Matscher and H. Petzold (eds.) Protecting Human Rights: The European Dimension: Studies in honour of Gérard J. Wiarda, (1988), 33.

decisions of the European Court of Human Rights have developed a jurisprudence on the subject which some believe was not in the minds of the signatories when they ratified the Convention. This has taken the Convention beyond simple statements about rights and freedoms which have universal appeal, to a large number of detailed rulings whose effect on the legislation and administrative practices of ratifying states is being felt increasingly as years go by.³⁰

Various works on transplants of laws are rather dated, however. Some of the questions they ask, namely those concerning the need to devise criteria of "transplantability" of laws and institutions, methods to "acclimatise" the grafted law, or the warnings against the indiscriminate use of transplants are of less relevance for this dissertation (although it may be advisable for those attempting law reform to bear those considerations in mind).³¹ For our purposes, however, one of the metaphors to be retained is the one concerning whether a "transplant" was modified by the new environment where it "took root" and apparently was not "rejected". Sophie Boyron provides us with a more modern example of a (probable) "rejection" of a legal transplant: the principle of proportionality may not work in English law as it does in France, to the extent that a "repudiation" could ensue:

Such concepts cannot be viewed in isolation, but are integrally related to the whole theoretical framework which exists within a particular legal system. If the proposed 'transplant' does not take into account the framework into which it is integrated, the graft could be rejected or could lead to endless problems. It is the view held by eminent comparative lawyers that one should proceed in such cases with the utmost caution: 'the line which separates the use of the comparative method in lawmaking from its misuse' is very fine. To avoid those dangers, some cautionary notes must be heeded: one must take into account certain factors

³⁰The Rt. Honourable Lord Hope, "From Maastricht to the Saltmarket" a lecture delivered before the Society of Solicitors in the Supreme Courts of Scotland, on November 6, 1992, 15.

³¹Otto Kahn-Freund, "On Uses and Misuses of Comparative Law", (1974) 37 MLR 1, 6.

when hoping to use comparative law in this way; one must also try to avoid generalizations on foreign systems and make use of the case law on a systematic basis.³²

Part of the comparative law inquiry to be undertaken in Chapters 7 to 10 tries to avoid generalisations and makes use of the Strasbourg case law as a microcosm where standards of different origins work themselves out in the creation of a "European" answer to human rights issues, prompted by the application of the ECHR "top-down" so as to measure the behaviour of the member states. As a result, the system infiltrates "new or "alien" legal conceptions with which a given national legal system may have to come to terms."³³ No member state was legal *tabula rasa* as regards civil liberties, therefore it explains the interest of the comparatist in the outcomes of various legal systems coming together before supranational organs and the importance of the comparative method in the process of decision making.

Transplantation of standards of protection

In general, legal transplants into another system can involve different combinations of statutes, rules, principles, case law or even the systematics that organise a legal order. The expression "transplants of laws" used here consists in, on the one hand, a transfer by Strasbourg to the member states of the different rules and clusters of rules that are made up principally of the substantive law laid out in the ECHR and its Protocols and also, the Court's case law. The latter conveys the Strasbourg standards of protection as well as the Court's

³²Sophie Boyron, "Proportionality in English Administrative Law: A Faulty Translation?", (1992) 12 Oxford Journal of Legal Studies 237, 238.

³³Thomas Buergenthal, "Interaction of National Law and Modern International Agreements: Some Introductory Observations", (1970) 18 AJCL 233, 234. See also the questions asked in: Kahn-Freund, "On Uses and Misuses of Comparative Law", (1974) 37 MLR 1, 6.

autonomous concepts. Obviously, the particular combination of ingredients actually transplanted differs from one country to another.

In addition, there is the aspect to this transplantation, which is the transmission of rules principally by means of legal principles and legal knowledge from the member states to the Court and also the Commission. The Strasbourg organs are themselves composed of lawyers from different member states and different legal orders, therefore it is plain that their experience and knowledge supplies comparative insights but introduces pressures as well. Given the way the law of the Convention operates, then it is clear also that each case where Convention law is discussed will bring into contact at least two legal systems, and therefore, it is to be expected that the tensions which arise have some effect on legal interpretation.³⁴

As an "incoming tide" of standards of protection - minimum or maximum - expected to apply throughout the member states, the "transplanted" ECHR can produce a measure of harmonisation of approaches. Although the ancillary nature of the ECHR in relation to the member states' legal orders prevents the Strasbourg system from taking a stronger stance on harmonisation (the first restraint on the powers of state authorities lies in the hands of domestic law), the infiltration of the (supranational) Convention law sets however limits by either percolating or trying to percolate through to the constitutional arrangements of the member states. It provides an essential legal substratum of rights and freedoms that can be shared by all the member states who are all Western European democracies. The "transplanted law" does not implement "top down" uniformity as it does not set limits

³⁴The encounter of the systems and traditions will be explored further in chapters 5 to 10.

on other recognised rights by the member states.³⁵ Even so, one may be tempted to suggest that the activity carried out by the European organs amounts to a supranational judicial review, similar to that performed by constitutional courts.

Setting aside the controversy in favour or against the incorporation of the ECHR in domestic law - and doing this is not to deny its importance - the Convention standards can work their way into national law even where the ECHR has not been incorporated. Although the particular protections of the ECHR may not be invoked before the domestic courts, applicants can plead them before the European organs by availing themselves of the right of individual petition under Article 25 ECHR.³⁶ Experience shows that, as soon as this right is granted, individuals resort to the ECHR. This should not be taken to mean that the standards of protection found in the Strasbourg system are necessarily "better" than those of the domestic jurisdictions, what matters is that Article 25 ECHR widens the choice of legal tactics and strategies for the applicants (and their lawyers) despite non-incorporation. Sir Humphrey Waldock estimated that the relationship between the Convention and the domestic legal orders generated by Article 25 ECHR could be equated almost to the relationship produced by incorporation in domestic law:

³⁵Dimitros J. Evrigenis, "Le rôle de la Convention européenne des droits de l'homme", in: Mauro Cappelletti (ed.), New Perspectives for a Common Law of Europe, (1978), 351. In addition, Article 60 ECHR sets down that: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

³⁶Article 25 (1) ECHR lays down that "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

Acceptance of the right of petition creates a link between the Convention and the domestic law comparable to that created by incorporation. In Common Law and Scandinavian countries where the Convention is not part of the domestic law, this became apparent as soon as it began to penetrate into the minds of the legal profession that the right of petition concerned them in their own practice. As soon as domestic lawyers realised that recourse to the Commission was a genuine legal means of redress, forming part of their own legal armoury of legal remedies, it began to assume for them, in their own systems, the rôle of a true Bill of Rights. In countries which have both incorporated the Convention in their law and accepted the right of petition that effect is, no doubt, intensified.³⁷

Where the ECHR as substantive law is absent from the national statute books, it may infiltrate in a different way as a (supranational) "remedy", and thus it is capable of reversing the Latin maxim *Ubi jus ibi remedium* into *Ubi remedium ibi jus*.³⁸ If that is the situation, then there is a parallel with the origins of English common law. In the latter the Latin maxim is also reversed because, historically, remedies pre-dated the existence of the principles and rules governing them.³⁹

The existence of this "infiltration" of the ECHR ("through the back-door" or otherwise), however, does not mean the achievement of full harmonisation of approaches across the member states. The transplantation of Convention law is neither uniform nor are the approximation of approaches it promotes all-embracing. The possibilities of inconsistent interpretations in different national systems or in different areas within a legal system remain as will be seen in Chapter 3. The European *jurisprudence*, which aspires to guide national law in these matters, is itself

³⁷Sir Humphrey Waldock, "The Effectiveness of the System set up by the European Convention on Human Rights", (1980) 1 HRLJ 1, 11.

³⁸Sir Humphrey Waldock, *op. cit.*, 12.

³⁹C. M. G. Himsworth, "*Judicial Review* de los actos administrativos en el Reino Unido", in: Javier Barnes Vazquez (ed.) *La justicia administrativa en el derecho comparado*, (1993), 529

challenged by a (wide) doctrine of the margin of appreciation and its dependency on the context in which the case arises, the latitude afforded to member states on some public policy issues, the incompleteness of the catalogue of rights and/or the absence of a system equivalent to Article 177 EEC.

Nonetheless, it seems clear that bringing the Convention into play repeatedly over a period of time keeps it edging into municipal law and therefore, further recognition of the ECHR may be indirectly achieved. In the United Kingdom the effects of the ECHR are felt despite its "weaker" influence as compared to the situation in other countries where individuals can make their Convention-based claims directly before the national courts. Regardless of that disadvantage, according to Lord President Hope⁴⁰, the detailed Strasbourg rulings have "implications for the courts, even if the Convention as such remains outside our domestic law." In France also, the ECHR gradually expanded its role in domestic law. Despite incorporation, national judges at first were unwilling to make references to the ECHR's articles. If they did, it was usually without seeking illumination from the European case law. After some time, they eventually allowed the European *jurisprudence* to put them on the right interpretative path.⁴¹

National judges appeared more inclined to keeping their own familiar national approaches to rights and freedoms, while legal practitioners, for obvious reasons, were less conservative towards pleading the ECHR as another remedy

⁴⁰The Rt. Honourable Lord Hope, op. cit., 15.

⁴¹F. E. Dowrick, "Juristic Activity of the Council of Europe - 25th Year", (1974) 23 ICLQ 610, 627. France signed the basic ECHR in 1950, but it took them almost a quarter of a century to ratify it. Dowrick points out that the French reluctance to ratify can be attributed in the 1950s to the Algerian war, in the 1960s to De Gaulle's nationalism. There was a petition to France in the Vienna Conference of 1971 to ratify the ECHR, and in 1973 President Pompidou indicated French readiness to carry out ratification, which did not take place until 1974 when it passed the internal law ratifying the ECHR and several Protocols (see footnote concerning this in Chapter 3 of this dissertation) .

available to their clients.⁴² Apparently judges, unlike lawyers, were in general terms more inclined to stop and consider carefully whether the ECHR or the Strasbourg case law were binding on them, and if so, in what measure. In colonial Africa, conversely, even post-Reception colonial courts continued to cite English case law and relied on English text-books for guidance⁴³ with an almost submissive attitude to those elements "alien" to their legal systems.

Even if legal practitioners in Europe appear more enthused towards citing the ECHR than the national judiciary, the lack of widespread access to the required materials may still be a hurdle for furthering the use of the Convention in domestic litigation. For example, as far as the situation in the United Kingdom and Ireland are concerned, Mary Robinson wrote that she was in no doubt of the existence of such difficulty:

I am acutely aware of the lack of access for solicitors and barristers in Ireland and the United Kingdom. There are, of course, a few who specialise in this area and who have the knowledge of where to find the relevant materials. However, it is vital for the balanced development of human rights litigation that the legal profession in general in member countries should feel competent to advise on the issues, and to plead a case before the Commission and Court if so required.⁴⁴

This diagnosis is seemingly shared by Lord President Hope. He took it a step further, though, as he pointed out that the lack of access to the necessary materials on the part of the lawyers has repercussions on the judges' work, who do not have the appropriate Convention case law cited to

⁴²Concerning France, Judge Pettiti, pointed out that it was the lawyers who saw in the ECHR a sort of universal panacea, , "L'invocation de la convention européenne devant les juridictions nationales", in: Mady Schaffer (ed.), L'Avocat et l'Europe des 12 et des 21. La Défense des droits de l'homme. L'intégration communautaire perspectives 1992, (1988), 109 .

⁴³A. N. Allott, "The Authority of English Decisions in Colonial Courts", (1957) 1 *Journal of African Law* 23, 23.

⁴⁴ Mary Robinson, in: Mady Schaffer (ed.), op. cit., 82.

them, to the extent that the situation becomes a vicious circle. As a result, the ECHR is prevented from percolating into domestic case law.

(...) access to the relevant case law and other working materials on these subjects [both EU and Convention law] is extremely difficult for the judges, as it is indeed for most practitioners. This is in marked contrast to the ease with which research can be conducted into our own statutes and case law. On these subjects therefore the judges are especially dependent upon the researches of counsel. This is true both north and south of the border - it is not, I must emphasise, a peculiarly Scottish problem. I have heard it said that English judges are reluctant to explore the significance of the developing jurisdiction under the Convention and that, this being well known, it has its effect on counsel who do not wish to spend days researching into a topic on which the judge is likely to cut them short. As a result the judges have not had the jurisprudence cited to them, and it has not found its way into their judgments.⁴⁵

Moreover, many legal and non-legal elements intermingle with any legal implantation and may facilitate it or not. It has been said that, "As soon as human rights leave the lofty realms of academic debate and come down to earth, they become incorporated in women and men dependent on different States and political systems, with different life-styles, cultures, production techniques and also religious beliefs."⁴⁶ In the eighteenth century Montesquieu drew up a highly impressionistic list of non legal factors which affect the operation of the law in general, which was intended to support his thesis that the laws of one country do not readily fit into the legal system of another.⁴⁷ Today, he would have probably placed little faith in a supranational system such as the Convention because its existence seemingly contradicts his arguments that laws must relate to various physical and

⁴⁵The Rt. Honourable Lord Hope, op. cit., 17.

⁴⁶Final Report of the Colloquy on "The Universality of human rights in a pluralistic world"

⁴⁷Kahn-Freund, op. cit., 7.

political aspects of a country. Climate, topography, location and size of the territory and also, the degree of liberty, way of life, religion, inclinations, wealth, number and activities of the population, all have a bearing on the law. Laws are also related to one another, to their origin, to the purpose of the legislator, and to the order of things on which they are established, Montesquieu wrote.⁴⁸

Some of the elements in such an intuitive list may be among those that introduce the pull of diversity to the process of interpretation of human rights law nowadays. The constant tension between diversity and unity in human rights protection is not altogether alien to many of the factors that determine the "spirit" of the law, in addition to many others that Montesquieu left out of his list or which did not exist more than two centuries ago.

Many writers in the twentieth century have also thought that only in the most exceptional cases could the institutions of one country be used somewhere else, although such assertion is a qualified one in view of the interconnection of world society (put by the sociologist Wilbert E. Moore in the 1960s as "the world is a singular system"⁴⁹) which can facilitate transplants.⁵⁰ A similar line of thinking led Robert Seidman⁵¹ to question the value

⁴⁸Montesquieu, The Spirit of the Laws, translated and edited by Cohler, Anne M et. al. p. 8 and 9. Montesquieu analyses the operation of the law in their relation to various environmental factors, as follows: "On the laws in their relation to the nature of the climate" (Book 14, Part 3); "On the laws in their relation with the principles forming the general spirit, the mores, and the manners of a nation" (Book 19); "On the laws in their relation to commerce, considered in its nature and its distinctions" (Book 20); "On the laws in their relation to the use of money" (Book 22); "On the laws in their relation to the number of inhabitants" (Book 23) and "On the laws in their relation to the religion established in each country, examined in respect to its practices and within itself" (Book 24).

⁴⁹Wilbert E. Moore, "Global Sociology: the World as a Singular System" (1966) 71 American Journal of Sociology 475.

⁵⁰Kahn-Freund, op. cit., 8 and 9.

⁵¹Robert B. Seidman, The State, Law and Development, (1978), 30. To stress the absurdity of those "transplants", and especially the fact that laws are apparently still being mechanically copied from the former metropolis, he quotes on page 34 two examples: the first concerns Lesotho, who borrowed the highway traffic act of South Africa and as a consequence lorries

of the transference of English law to Commonwealth Africa, and he proposed the "Law of Non-Transferability of Laws" which affirms that legal transplants fail to induce behaviour in their new home similar to that induced in their original site. This "law" has a few corollaries, such as laws are addressed to an addressee prescribing a behaviour, however, how an addressee will respond depends not only of the rules but also, of a complex of other factors. Custom, geography, history, technology and other local conditions, although not a function of the law, were different in Africa from those in England⁵² and therefore the law "grew" differently.⁵³ British lawyers imposed the law they knew and consequently believed to be "good"⁵⁴ (and which probably "worked well" for the Colonial power) but, unsurprisingly, English law by itself could not foster behaviour in English-speaking Africa similar to what it encouraged in England. We may conclude as well that the physical and institutional environments of the different member states of the Council of Europe differ from country to country and from time to time, and that they explain in part the different "growth" of the ECHR in the various jurisdictions.

Political systems are much like legal systems from the point of view of their prospects of functioning properly after being transplanted to a new environment. T. Koopmans argued that numerous factors will inevitably affect the operation of a political system when transplanted to another country; he could have made the

above a set weight were banned from their roads, however, the country did not have a weigh-bridge; the second example points out that the penal laws of English speaking Africa contained an eighteenth century English provision forbidding wandering about at night with intent to commit a offence with one's face blackened.

⁵²Robert B. Seidman, op. cit., 31 and 35. It seems that a strict adherence to analytical positivism prevented British colonial service men from understanding this fact.

⁵³Sir Kenneth Roberts-Wray, "Adaptation of Imported Law in Africa", (1960) 4 Journal of African Law 66, 69. Also, the English law transplanted to (or borrowed in) Africa was as a rule the law in force in England on a specific date, although it seems to have been open to doubt whether decisions of English courts made after that (arbitrary) date were binding on African courts.

⁵⁴Robert B. Seidman, op. cit., 33.

same case as regards a legal system, for the reason that local conditions may affect the "transplant" to the extent that it will operate differently or worse, fail to "work" at all:

In some political systems, like the British system, legal considerations are less important in the end because guarantees against abuse of power by the rulers consist of political rather than legal remedies. In Britain the role of the opposition and of the back-benchers in Parliament, the prospect of general elections, and the fear of ferocious press reactions do more to keep rulers within bounds than the existence of the bar and bench together. The same system shows its weakness, however, when transferred to a different soil. That system did not, for example, work in the same way when it was applied in Northern Ireland, and it was a conspicuous failure when transplanted to Africa. In countries like Nigeria, Ghana, and South Africa, the system did not work because the political guarantees proved ineffective.⁵⁵

As in the situations of transplants and borrowing of laws, the domestic legal and political systems, each one with their own traditions and institutions, together with a host of extra-legal factors present in the new "soil" have a bearing on the interpretation and application of law. An often quoted example of the failure of formal changes to modify behaviour is that the grafting of the Swiss Civil Code onto Turkish family law by Attatürk's reforms did not transform Turkey into another Switzerland.⁵⁶ Coming back to the situation of the ECHR in municipal law, it should not surprise us that the British debate on the ECHR, for example, is coloured by national perceptions of what a judge should or should not be adjudicating on,⁵⁷ and understandably, the controversy itself may seem odd enough to a continental observer used to a very different organisation and role of the judiciary in society.

⁵⁵T. Koopmans, "Understanding Political Systems: A Comment on Methods of Comparative Research", (1986) 17 Ga.J.Int'l & Comp. L. 261, 268.

⁵⁶June Starr and Jonathan Pool, "The Impact of Legal Revolution in Rural Turkey", (1984) 8 Law and Society Review 533, 553.

⁵⁷J. A. G. Griffith, The Politics of the Judiciary, (1989) 3rd ed. reprinted, 85 and 235.

On laws and different "soils"

The differences between countries did not stop transplants of laws from taking place, however. Legal borrowing has been extensive in history and legal ideas were transported to very different geographical, political, social and economic conditions, and thus the major ingredients of Western legal systems have been borrowed from elsewhere, and only Roman law was apparently an exception.⁵⁸

There are examples of transplants which became applicable law despite the lack of connection with a particular society. Arguably, a legal order is fairly independent from the society where it operates as law exists as something distinct from other institutions, operating autonomously and in its own sphere. The Reception of Roman Law in Europe shows that a shared "*ius commune*" could co-exist with diverse (local) legal systems and that legal rules may be transplanted even though the relevant local circumstances of the donor and recipient countries are at variance. The Germanic tribes in Europe made use of Roman law rules and in the Middle ages there was a massive adoption of Roman rules in many dissimilar European states, be they monarchies, oligarchies or republics. Those people importing the Roman rules into the legal order of their countries were only interested in the rules and not in the context surrounding the operation of the law in Roman times.⁵⁹ Professor Watson has pointed out that at the time of the Reception of Roman law in Europe, the sources available to those who introduced it or to the law professors who taught it did not disclose the operation of those rules in practice. Not surprisingly, then, the Scottish law students who learned

⁵⁸Alan Watson, The Nature of Law, (1977),100.

⁵⁹Alan Watson, The Nature of Law, op. cit., 105.

Roman law in the Netherlands in the seventeenth century brought it back home with no knowledge of its effect in society. These observations do not exclude that some "imports" of laws may have been made because they were thought to have worked well, over a period of time, in their countries of origin. The point is therefore, that generally speaking, it is not necessary for legislators or law reformers who are searching out for ideas to have any systematic knowledge of the law or the political structure of the prospective donor.

Moreover, some writers suggested that the position towards which the ECHR is heading to in Europe as regards the protection of human rights is part of a process in which a new shared law in Europe is being created. Different local conditions do not necessarily rule out the viability of a supranational legal order ("*ius commune*") which can therefore co-exist alongside various national legal orders ("*ius proprium*").⁶⁰

On the creation of a European shared law, T. Koopmans wrote that,

... I submit that a new *ius commune* for Europe is taking shape before our eyes. We see it, but we are not completely aware of it. And that is so because our minds seem to have different compartments, and our languages different concepts, for what is in reality one and the same process. We see it in terms of Community law, or of human rights protection, or of general principles of law, or of comparative methods - and each of these branches has its own specialists. We could, however, also see the same evolution in a completely different perspective, by taking the common legal heritage of Europe as our point of departure and by then combining those aspects of legal evolution which are making common

⁶⁰Michel De Salvia, "L'élaboration d'un "*ius commune*" des droits de l'homme et des libertés fondamentales dans la perspective de l'unité européenne: l'œuvre accomplie par la Commission et la Cour européennes des droits de l'homme", in: F. Matscher and H. Petzold, Protecting Human Rights: The European Dimension; Studies in Honour of Gérard Wiarda, (1988), 556.

what used to be separate. In that sense, we may be witnessing the birth of a new *ius commune*.⁶¹

History gives us other (very different) examples where the law did not grow out of the "common consciousness" of the people of a particular country (paraphrasing the expression of the nineteenth century German jurist von Savigny)⁶² but which was nevertheless applied to them as sort of *ius commune*. After the Treaty of Union between England and Scotland many Scots left for several British colonies where they had to live under transplanted English law.⁶³ And so did thousands of Germans, Italians, Jews, Poles, Scandinavians and many others who, as a consequence of emigration to America in flight from lack of opportunity, persecution or hunger in their native Europe (and elsewhere), lost their connection with their legal systems, but could organise their lives under the common law of their country of adoption, which having been transplanted from England, was the product of other people and culture.

The two-way and on-going "European" variety of transplants

The European law of human rights is compared in this dissertation to an "incoming tide" being poured out by the Strasbourg Court and coming into the member states (in a process of "top-down transplantation"), but part of that

⁶¹T. Koopmans, "Towards a New 'Ius Commune'", in: Bruno de Witte and Caroline Forder (eds.), The common law of Europe and the future of legal education, (1992), 49.

⁶²F. P. Walton, "The Historical School of Jurisprudence and Transplantation of Law", (1927) 9 Journal of Comparative Legislation (3rd. series) 183, 183-4.

⁶³T.B. Smith, Studies Critical and Comparative, (1962), 91. This writer, interested in the issue of the expansion of the common law at the expense of the civil law, asked an interesting rhetorical question: "Had even these alone been permitted to take with them to their new homes the essentials of their municipal law - which knew no dichotomy of law and equity; which was unfettered by forms of action; and which was largely based on Roman law and on theories of jurisprudence accepted by other colonising nations of Western Europe - who could be certain that the Common Law would have prevailed in North America?"

tidal flow is, however, law which the Strasbourg organs took from the legal systems of the member states. For example, the European Court and also the Commission perform a comparative survey and draw principles from domestic law which are incorporated into the decision making process as the "European consensus" on a legal institution in the laws of the member states (part of the "bottom-up" process of infiltration of a shared law). As said, there is also the borrowing of principles for decision making which are taken from the member states' legal systems by Strasbourg. Among them, there is the principles of "proportionality", the "accessibility and previsibility of the law", the "balance of convenience" of the interests involved, and so on. In general, there are no explicit references made as regards the particular domestic legal order from which a specific contribution was taken, nevertheless, this inspiration albeit indirect is unequivocal.⁶⁴ The point is that Convention law is therefore the result of a two-way transplantation.

Marc-André Eissen wrote that "For the reason indicated a moment ago [that is, the development of the "autonomous concepts"] and also thanks to, of course, a deeper specialisation, the organs of the Convention, the Court in the first place, "export" more than what they "import"."⁶⁵ The main exports of the European Court to the constitutional orders of the member states are its autonomous concepts developed in its case law, for example: "criminal charge"⁶⁶; "mental patient"⁶⁷; "conviction"⁶⁸; "determination of his civil rights and

⁶⁴Marc-André Eissen, "L'interaction des jurisprudences constitutionnelles nationales et de la jurisprudence de la Cour européenne des Droits de l'homme", in: Dominique Rousseau and Frédéric Sudre, Conseil Constitutionnel et Cour européenne des Droits de l'homme: Droits et Libertés en Europe, (1990), 140-141.

⁶⁵Marc-André Eissen, op. cit., 146.

⁶⁶Art. 6 (1) ECHR.

⁶⁷Art. 5 (1 e) ECHR.

⁶⁸Art. 5 (1 a) and Art. 7 ECHR.

obligations"⁶⁹; "correspondence"⁷⁰; "detention"⁷¹; "deprived of his liberty"⁷²; "law"⁷³; "witness"⁷⁴; "vagrant"⁷⁵ and many others. The Court strives to give them a "European" meaning (as opposed to the meaning they may have in a particular jurisdiction). The arguments of Montesquieu and several other writers as regards the influence of local conditions on transplants are somewhat to the point again because many of these notions have different meanings in the member states,⁷⁶ however, the practice of the Court of giving them an "autonomous" meaning may enhance their "transplantability" as their meanings are independent of those in national law.

In Colonial Africa, conversely, the transplantation of English law tended to proceed one-way. Although there were "flows" within Africa itself and between India and Africa, the main tendency was, however, that of "exporting" laws from the metropolis to the colonies. The two operations involved in the process were, first, borrowing English law to supplement and modify African law, and second, adapting the imported law to Africa.⁷⁷ The member states of the Council of Europe, unlike their (former) colonies participate more actively in the different aspects of the creation of European human rights law. Within the Council of Europe, of course, the relationship between a metropolis and a colony is absent; all the member states are able to participate on an equal footing to shape the law that is, in turn, transplanted back into their own systems. Further, we should not

⁶⁹Art. 6 (1) ECHR.

⁷⁰Art. 8 ECHR.

⁷¹Art. 4 (3 a) ECHR.

⁷²Art. 5 ECHR.

⁷³Arts. 2 (1) and (2 c), Arts. 5 (1 b) and (3), Art. 6 (1), Art. 8 (2), Art. 9 (2), Art. 10 (2), Art. 11 (2); and Art. 12 ECHR, and also, Art. 1 Protocol 1 and Art. 2 (3) Protocol 4, "judge or other officer authorised by law to exercise judicial power" Art. 5 (3) ECHR.

⁷⁴Art. 6 (3 d) ECHR.

⁷⁵Art. 5 (1 e) ECHR.

⁷⁶Marc-André Eissen, *op. cit.*, 142.

⁷⁷Sir Kenneth Roberts-Wray, *op. cit.*, 76-7.

picture in our minds that this two-way relationship between Strasbourg and the member states is strictly limited to an exchange with the countries presently within the Council of Europe. It can be speculated that the same kind of transfer will quite probably take place when more and more Eastern European countries come into the fold of the Council of Europe and its human rights system.⁷⁸ If the Council of Europe's⁷⁹ main task in the recovery of Eastern Europe is to give advice on the mechanics of constitutional government and the protection of human rights then, it makes sense for the system to be receptive to the experiences and legal traditions of the new members, for one thing, it will facilitate transplantation.

Both situations are also to be contrasted for other reasons. The relative size of the "transplants" involved is different. Despite the fact that in both cases the imported law has been introduced to a varying extent and by various means, Convention law certainly does not constitute the major part of the law applicable in each member state. Further, its area of coverage is restricted to civil liberties and not even to all of them and its role is secondary to the available autochthonous legislation and case law on human rights.

With regard to other aspects, however, the situations are comparable. First, the notion of two competing forces, the "unity" provided by the transplant (a law shared by metropolis and colony)⁸⁰ versus the "diversity" of local

⁷⁸Judge Pettiti anticipates that in the near future the new members will extend the Europe of the Council almost to the Ural Mountains. See: Louis E. Pettiti, "La Commission et la Cour européenne des droits de l'homme", in: Mario Bettati, Fritz W. Hondius, Jean Michaud, Louis Pettiti, Joël Rideau, Jacques Robert and Frédéric Sudre, Les droits de l'homme et la nouvelle architecture de l'Europe, (1991), 20-21.

⁷⁹"Securing Europe's peace", in Europe: The Revolution of 1989-92, a collection of articles first published in The Economist between November 1991 and February 1992.

⁸⁰Admittedly, it is possible to "borrow" work from law commissions which therefore would have never been applicable law anywhere or the "transplant" could end up being so modified that it becomes a piece of legislation entirely different, and so on.

conditions which explain the differences between the different "growth": the transplant turned out differently in the colonies and could not induce behaviour similar to that generated in the metropolis. The interpretation of the "transplanted" law of the Convention suffers from the tensions between similar tendencies under a different guise. One is the pull of diversity. It concerns the effect of the various different local conditions obtaining in the member states and the existence of many legal systems that protect human rights in Europe. In addition to national law and the "transplanted" Convention, in some of the member states there is the system of the EU which concerns itself with human rights on questions of EU law, and more generally, there is the international law of the United Nations and a host of international treaties signed by the member states. Taken to an extreme, the various systems and the variety of local conditions work against the harmonisation of human rights protection. The other force is the pull towards a single system of human rights protection in Europe. As a result, the construction of human rights law stands at an interpretative cross-roads: it has to attempt to integrate the particular approaches of a variety of legal systems but guided by a tendency towards uniformity. There are pressures between "top-down" European standards and "infiltrations" of "bottom-up" national singularities, between tendencies to one and to several European systems. Those issues will be discussed in the ensuing chapters, which will look, for example, at the effect of local conditions (which can percolate to the Strasbourg decision making process) on the process of interpretation, as in *Tyrer v. the United Kingdom*.⁸¹ In that case, the European Court refused to respect the singularities of the Isle of Man concerning corporal punishment of young offenders, despite its

⁸¹(1979-1980) 2 EHRR 1.

allegedly long tradition on that island.⁸² The dissertation will also try to show that domestic law cannot really put up barriers to roll back the tide of Convention law. Some cases appear to support this view, particularly those where the Convention is grafted onto a local institution that cannot measure up to the European requirements and as a result, the local institution has to give way to the European standards. For example, the fair trial requirements of Article 6 ECHR are at odds with some aspects of the *Ministère Public* of civilian countries; or a long detention on remand, possible in some member states, is not consistent with the terms of Article 5 ECHR.⁸³ On the other hand, local conditions introduce changes in the interpretation of the "foreign" law, which account for differences in the final outcomes of the cases or in their implementation, such as for example, in a series of cases concerning transsexuals, the comparative problem for the Court is how to apply its standards to the essentially different administrative legal systems of France and England while at the same time treating them equally and avoiding contradiction in its own *jurisprudence*. Dwelling for a moment on the many-sided nature of the subject, on the one hand, as it has already been said, the boundaries between the systems of protection are being constantly re-defined, while on the other, the experience of transplants in other epochs or lands suggests that transplanted laws need time to "take root". Setting aside whether a "transplant" achieved complete success or not (for this is so difficult to measure) the completion of the Reception of Roman law in Europe took a considerable length of time. Although the

⁸²The Independent, March 6, 1993, "Isle of Man says it will abolish 'brutal' birching": "An appeal to the European Court of Human Rights in 1979 resulted in the birch being condemned as a "cruel and unusual punishment". The island was advised to remove it from the statutes, but failed to do so. A young Scottish holiday-maker who smashed a pint glass into another teenager's face on a ferry to Douglas in 1981 was sentenced to four strokes. His lawyers had this reduced to a fine on appeal, quoting the European ruling. No such sentence has been handed down since."

⁸³More on this in Chapter 9.

rhythm of change and development is quicker now than then, it is suggested that Convention law has achieved a degree of success as regards harmonisation in some areas of human rights law, and in addition, it seems reasonable to expect harmonised approaches in other areas in the future.

The coming into contact of the legal systems: the relationship between the comparative method and "transplants". Will comparatists ever be made redundant?

The study of transplants carries with it another useful notion for this work: the "transplants" and "tides" taking place in the law of the Convention bring together various legal systems, and therefore, explain the need for the comparative method to attempt an answer to the question "Is there a European law of Human Rights?". This study aims chiefly at analysing the tensions between the civilian and common law elements present in the interpretation of Convention law, how they are enunciated, how they finish up in the encounter with one another and how they eventually influence outcomes.

Mario Chiti asserted that although there are still important differences between national legal systems for the time being, those may disappear some day in the future due to the pressures of European Community law. He put it this way:

As this administrative law [in the system of the EU], common to all the member states, and elaborated or advanced by the Community, becomes more extensive and pervasive, the task of the comparatist whose interest lies in evaluating the characteristics peculiar to each national system, will as the differences in time become fewer, be diminished.⁸⁴

⁸⁴Mario Chiti, "Administrative Comparative Law", (1992) 4 European Review of Public Law 11, 25.

If that speculation is true it means that the differences between the systems, families or legal traditions will be done away with at some point in the future and one of the consequences, put tongue-in-cheek, may be that comparatists will lose their jobs. The experiences of transplants, including the massive reception of Roman law (a "*ius commune*") suggest otherwise, because even when the reception was "completed" the European "*ius commune*" so created did not supersede local laws.⁸⁵ It is suggested, therefore, that the situation as regards Convention law will not necessarily be different. Most likely, diversity will not disappear and comparatists will always be able to set side by side the different legal systems and find meaningful points of contrast and similarity between them in spite of the various incoming tides of European law (including, of course, EU law) taking place over the years.

In the nineteenth century, as the codification in continental Europe cut national systems off the European common or shared law, the first studies of comparative law came into being but most of them stressed the differences between the systems.⁸⁶ Today, the European systems of integration, and their "incoming tides" of European law operate in the opposite direction by breaking the isolation of national law. The differences between the systems are still active, however, and they affect interpretation. A comparative study is therefore appropriate to see the operation and effect of the differences between systems and families.

⁸⁵T. Koopmans, "Towards a new '*ius commune*'" in: Bruno de Witte and Caroline Forder (eds.), The common law of Europe and the future of legal education, (1992), 43.

⁸⁶Gino Gorla and Luigi Moccia, "A 'Revisiting' of the Comparison between 'Continental Law' and 'English Law' (16th-19th Century)", (1981) 2 *Journal of Legal History* 143, and Luigi Moccia, "English attitudes to the 'Civil Law'", (1981) 2 *Journal of Legal History* 157. Also relevant for this stage is H. C. Gutteridge, Comparative Law: An Introduction to the Comparative Method of Legal Study & Research, (1974).

The European Court is situated at the top of a multiplicity of legal systems and comparative techniques are resorted to as a matter of course in the process of passing judgment, especially as a tool of construction. To begin with, the Court looks for a "European consensus" on a certain area of the law, which is a result of a comparative survey of the laws of the member states. In addition, comparative techniques are used to make sense of the cases in the context of the legal systems in which they have been argued. Finally, the Court also seeks inspiration and borrows "principles" from the legal orders of the member states.

In general, the comparative method rests on the assumption that the civilian and common law legal systems still differ, and for that reason, established distinctions between them can provide useful criteria of differentiation. In a sense mirroring the comparative activities of the European Court, the comparative method will be used in this dissertation as a tool of study. The method will let us detect whether, and if so when, those different legal systems and traditions mould the judicial process and the *jurisprudence*. It has to be stressed, however, that those factors operate in conjunction with others, so although they impress upon the results of the cases they do not altogether determine them. Each case will be analysed as a microcosm of the pressures between legal systems in the framework of a confrontation between unity and diversity as regards systems of protection.

A comparative test based on differentiating factors will be applied to individual European Court decisions so as to find, make visible and gauge the relative importance of the common law and civilian elements present in the interpretation of Convention law. The criteria for the analysis are sets of questions derived from the approaches

of the legal traditions to a series of issues.⁸⁷ Those concern the nature of law and its role in society, the organisation of the legal system and the judicial function, and the sources of law and legal method, as well as matters of style and the use of legal materials. Further, the aspects touch upon differences in the legal methodology, in the relative importance of the different institutions within the system, in the method of reasoning, in the hierarchy of sources, even in the very idea of law. The particular aspects to study will be classified as follows: the general structure of the legal system of the respondent member state, the procedural law, the rules of evidence, and finally, the classification and rules of what is private and public law.⁸⁸ These well-defined particularisations are intended to overcome the disadvantages of a nineteenth century approach consisting in running sweeping parallels and contrasts.⁸⁹ The method will focus the comparative research on the operation of the law in the case law and as a result, it will highlight the "pull" of the legal traditions in each case.

The analysis to be carried out in this dissertation, although mainly based on the study of the *jurisprudence*, is not altogether limited to it. For example, the method will be applied to the Strabourg procedure. For that purpose, the following questions will be asked: whether the procedure consists of "stages", whether it tends towards an inquisitorial approach, whether it is "*contradictoire*", and finally, whether it favours written over oral exchanges. The analysis is intended to help us

⁸⁷ Particularly relevant for the formulation of the comparative method in this dissertation are: Liana Fiol Matta, "Civil Law and Common Law in the Legal Method of Puerto Rico", (1992) 40 AJCL 783, Peter H. Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution (Documents of the Royal Commission on Bilingualism and Biculturalism), 1969, and T. B. Smith, Studies Critical and Comparative (1962), particularly the chapter: "The Common Law Cuckoo: Problems of 'Mixed' Legal Systems with Special Reference to Restrictive Interpretations in the Scots Law of Obligations", 89.

⁸⁸ See: A. Watson, The Making of the Civil Law, (1981) 1 and 14; also K. Zweigert and H. Kötz Introduction to Comparative Law, (1987), 69.

⁸⁹ Basil Markesinis, "Comparative Law - A Subject in Search of an Audience", (1990) 53 MLR 1, 2.

understand the "spirit" of the European Court, particularly whether it tends to a civilian or common law model.

In addition, a jurisprudential analysis of the Court's decisions will be carried out, and the focus of the comparative study will be on the judgments' "style" in order to establish whether they tend to be deductively justified as the decisions passed in the civil law world or whether they are tightly argued as in the common law. There will be a study of the protection of human rights in the EU system from the point of view of the same comparative method.

A comparative study will also be performed on the domestic position and uses of the ECHR by the national courts in a common law jurisdiction (England), a "mixed" jurisdiction (Scotland) and two civilian countries (France and Italy) in order to see how the law of the ECHR is assimilated within the local legal system. The way a legal system evolves and takes in transplanted law cannot be dissociated from its own characteristics and "this is what makes for the usefulness of comparative study in a world where international relations and activities are taking an increasingly important place."⁹⁰ The legal and extra-legal factors surrounding the operation of the receiving legal system in the member states work against the dissolving of all their peculiarities in a single system, a reason for preferring the term "harmonisation" instead of "unification" when addressing the effect of the transplanted law of the ECHR.⁹¹

Lastly, the influence of the traditions will be approached from the point of view of another type of "transplant":

⁹⁰Joseph Dainow, "The Civil Law and the Common Law: Some Points of Comparison", (1967) 15 AJCL 419, 435.

⁹¹Michel De Salvia, *op. cit.*, 556.

this time on the people (drawn from the various member states) who were involved in drafting the ECHR and also, those who are now in charge of its application in Strasbourg. The analysis is based on the assumption that lawyers in general are bound to draw upon their own experience and training in the particular legal system form where they come from. The pull of the traditions will manifest itself through their reactions to the legal issues involved in drafting or in deciding as case may be. The same comparative method will therefore be applied to the work of the drafters, judges and commissioners as observable in the *travaux préparatoires*, the ECHR itself and the Strasbourg case law.

Further details concerning the comparative method are to be provided in the chapters where it is used. Finally, it can be conjectured that comparatists working on the law of the Convention will not be put out of their jobs.

The "flood" in action: the transplants taking root.

Although in some cases the "incoming tide" of Convention law entered the domestic legal systems in a limited sense, in some others, it appears to have infiltrated all the way down to municipal law and even to the subconscious of lawyers and domestic judges. Infiltration can be looked at as it takes place mainly influencing the legislature or the judiciary, that is, as prompting changes in the statute book and in the case law. As regards changes in the law books, a study found that:

[...] the responses of the countries from the various systems of law did not differ greatly at all. The difference was in how they responded not whether they responded. The dissimilarities between the responses of Scandinavia and those of the other geographic areas was that, for the most part, Sweden was more open in stating that the change in national legislation was

due directly to a ruling regarding the Convention or the Convention itself.⁹²

Let us consider briefly a few examples of statutory changes prompted by the law of the Convention. Although the examples of the European Court taking notice of changes in domestic law point to the significance of a wider survey of the effects of the penetration of the Convention (let alone the issue of the legitimacy of the Strasbourg system asking the member states to change their laws), unfortunately that survey exceeds the scope of this dissertation. This section, therefore, is restricted to provide a few indications in that area, in the hope that these will give an idea of this other aspect of the effects of the "incoming tide".

The several consequences of this "incoming tide" on the legal systems span from the incorporation of the substantive law of the ECHR in municipal law or the enforcement of the judgments of the Court to the citation of European precedents in domestic cases, to those more remote consequences, such as the citation of European literature or even the knowledge of European law on the part of legal practitioners and judges. Added to that, the Convention law puts further pressure on the domestic legal systems by requiring governments to legislate and their courts to develop appropriate methods of interpretation to protect human rights.⁹³ The armtwisting Strasbourg is capable of may vary according to jurisdiction.

Strasbourg enjoys survey and control capabilities which are restricted at best. Under Article 54 ECHR the

⁹²Jody Rose Platt, The European Convention on Human Rights and Fundamental Freedoms: Its Influence on national legislation and administrative practices of its member-states, Ph.D dissertation, The American University, (1992),154.

⁹³Tom Campbell, "Introduction: Realizing Human Rights", in Tom Campbell, David Goldberg, Sheila McLean and Tom Mullen (eds.), Human Rights: From Rhetoric to Reality, (1986), 7.

Committee of Ministers only examines *prima facie* whether the state concerned adopts measures in good faith to give effect to a judgment, but does not carry out an abstract control of the laws. A lenient attitude towards the governments on the part of the Committee may lead to the same issue being successfully litigated again, as for example, the issues of prisoners' correspondence in the United Kingdom. After *Golder v. United Kingdom*⁹⁴ the Rule 37-A of the Prison Rules was amended, but apparently without removing all other defects, and such failure gave rise to the *Silver* case.⁹⁵ In *Silver* the government appeared to play down before the Committee of Ministers its obligations under Articles 53 and 54 ECHR but before the Court it relied on a resolution adopted by the Committee concerning the *Golder* case in order to say that the Committee had approved the measures taken as being in compliance with the decision of the European Court. Every so often the governments appear to voice contradictory views at the Court, the Committee of Ministers or the national parliaments⁹⁶ and this shows yet again the gaps between the law in the books or the theory and the empirical world. The case *Abdulaziz, Cabales and Balkandali v. United Kingdom*⁹⁷ also has a claim to our attention in this matter. The minister concerned addressing the House of Commons, spoke of the United Kingdom being "duty bound to make the changes required to

⁹⁴(1978-1979) 1 EHRR 524.

⁹⁵The report "Survey of Activities 1959-1989" of the European Court of Human Rights ([ACTIVITIES.SURVEY] AB of 1990) mentioned a memorandum of Mr. Lester, QC, to the Home Affairs Sub-Committee, p. 34 and 35, and also Hansard (HC) vol 974, cols 256, 428, and the repetition in the First Report of the Home Affairs Committee 1979-80- Proposed New Immigration Rules and the European Convention on Human Rights: HC 434, February 11, 1980, all of them pointing out the absence in United Kingdom of a standing body to scrutinise draft legislation or rules for conformity with the ECHR as it is the case in other member states. For further discussion of this issue, see: David Kinley, The European Convention on Human Rights: Compliance without Incorporation, (1993), where he recommends the introduction of a system of pre-legislative scrutiny of all legislative proposals for compliance with the ECHR in the United Kingdom.

⁹⁶P. Leuprecht, Director of Human Rights, Council of Europe, making comments on J. Vieu's paper at the Sixth International Colloquy about the European Convention on Human Rights.

⁹⁷(1985) 7 EHRR 471.

comply with the Convention as interpreted by the Court." A Strasbourg official asked this very pertinent question "why the inconsistencies?" then added, "I hope that the explanation is not that the Court and national parliaments are exposed to the glare of publicity whereas the Committee of Ministers meets in secrecy, behind the padded doors of the Palais de l'Europe" and finally made the following quite surprising statement: "I honestly think the public would sometimes be shocked to discover the things that are said in the secrecy of the committee."⁹⁸

Whatever the case, in various suits against Italy, the Court seemed to take into account the fact that that country had introduced reforms in domestic law purportedly to comply with the ECHR, as follows: "The Court stresses that special diligence is necessary in employment disputes, which included pensions disputes ... Italy moreover acknowledged this by amending, in 1973, the special procedure laid down in this field and by introducing, in 1990, emergency measures intended to speed up the conduct of such proceedings."⁹⁹

There are other cases where the European Court kept in view the measures taken in domestic law as regards the implementation of Convention law. For example, in the case *Silver v. United Kingdom*¹⁰⁰, where the applicants, all convicted prisoners, complained of the control of their mail by prison officers and the European Court found a breach of the ECHR. The point that interests us is that the Court pointed out that as of December 1, 1981, the United Kingdom had changed the directives on correspondence. Although those changes could not be taken into consideration because the revision of the rules took

⁹⁸Sixth International Colloquy about the European Convention on Human Rights., 818.

⁹⁹Cases versus Italy where the quoted paragraph is used: Nibbio (28/1991/280/351) para. 18, Borgese (28/1991/281/352) para. 18, Biondi (28/1991/282/353) para. 18, Monaco (28/1991/284/355) para. 17 and Lestini (28/1991/306/377) para. 18.

¹⁰⁰(1983) 5 EHRR 347.

place after the relevant events, the Court nevertheless acknowledged them:

In general, it is not the Court's task to rule on legislation *in abstracto*; indeed, at the time of the events giving rise to this case, the new regime was not yet in force. Its compatibility with the Convention therefore cannot be examined by the Court. However, the Court notes with satisfaction that, following its Golder judgment on the one hand and as a result of the applications in which this case originated on the other, substantial changes have been made by the United Kingdom with a view to ensuring observance of the engagements undertaken by it in the Convention.¹⁰¹

Not everything is so gloomy, however. The law in both the statute and case books tells us that the Strasbourg organs have been created, that they are in operation and that they subject to international control the functioning of the internal institutions of the member states.¹⁰² Unlike the situation in Europe in the 1930s and 1940s, a supranational recourse against (oppressive) policies on the part of governments is now available.¹⁰³

When the European Court passes judgment, Articles 32 (1), (2), (3), (4), 50, 53 and 54 ECHR, and Articles 3 and 8 of the Statute of the Council of Europe come into play.¹⁰⁴ Although only the judgments of the Court are binding and the decisions of the Commission are not, sometimes even before the pronouncement of the Court¹⁰⁵ or the

¹⁰¹(1983) 5 EHRR 347, para. 79.

¹⁰²Polys Modinos, "Effects and Repercussions of the European Convention on Human Rights", (1962) 11 ICLQ 1097, 1100-4

¹⁰³F. E. Dowrick, *op. cit.*, 628.

¹⁰⁴See Vincent Berger, "Case Law of the European Court of Human Rights" Vol. I 1960-1987, (1991) 2nd. reimpression, 409; A. H. Robertson, "Applying, and effecting compliance with, decisions (with reference to the European Convention on Human Rights)" in Stephen Schwebel (ed.) The effectiveness of international decisions, (1971), 346 and A. H. Robertson, "The European Convention on Human Rights" in Evan Luard (ed.) The International Protection of Human Rights, (1967), 123.

¹⁰⁵As far as Scotland was concerned, it appeared that the Scottish educational authorities were advised to abolish by July 1984 the use of the "tawse" to impart corporal punishment in schools even before the Court had given judgment. (The Times, February 25, 1982).

Commission,¹⁰⁶ the mere filing of an application may produce the desired effect.¹⁰⁷ The decisions of the Court are final and have the force of *res judicata* only in the case which led to the actual judgment.¹⁰⁸ The Court makes a pronouncement on whether a violation took place, and if so, on whether just satisfaction will be granted to the injured party. The Court does not annul or amend any measure taken by a member state nor does it suggest to the member state concerned any measure or remedial action to implement a judgment.¹⁰⁹ Just satisfaction means monetary compensation or perhaps only a declaration that a right has been violated¹¹⁰ and in such case, the member state is not, however, forced to quash, abrogate, withdraw or modify the offending measure.

A breach of the ECHR could arise partly or wholly from the law of the member state, but the corrective action the member state can undertake does not necessarily involve the introduction of legislative changes as other means can be used, for an example, appropriate changes in court practice.¹¹¹ A violation could also come from the exercise of a discretion enjoyed by a domestic authority under municipal law, such as the *Golder* case and the UK Prison Rules, or even arise out of the very existence of a law in breach of the ECHR, for example, the *Dudgeon*¹¹² case.

¹⁰⁶In response to the extent the Commission was bound by its own previous decisions, see *Hansard*, (HC) vol 974, col 256, 428. See p. 62 and 13, para 48.

¹⁰⁷F. E. Dowrick, op. cit., 625. For instance, in the case *Knechtel v United Kingdom* the applicant while in prison believed he had reason to sue the prison doctors for negligence but was prevented from corresponding with a solicitor. In December, 1970, the Commission declared the case admissible, the United Kingdom government made an "ex gratia" payment to the applicant and issued instructions to prison governors to facilitate access to legal advice.

¹⁰⁸Article 52 ECHR.

¹⁰⁹P. Leuprecht saw in Judges Wiarda's and Ryssdal's opinion in the *Skoogström* case a disappointment with the majority's reluctance to let the Court "enlighten" the national legislature with a ruling on the merits.

¹¹⁰Article 50 ECHR. See his comments on J. Vélú's paper at the Sixth International Colloquy about the European Convention on Human Rights.

¹¹¹J. Vélú, "Responsibilities for States parties to the European Convention", Proceedings of the Sixth International Colloquy About the European Convention on Human Rights, (1988) YECHR 588.

¹¹²(1982) 4 EHRR 149.

On the other hand, a study of compliance with the European Court rulings based on statistics may have to overcome the difficulties concerning the differences in keeping this kind of information in the different member states.¹¹³ Similarly, their respective bureaucracies differ, to the extent that the experience gained by the (hypothetical) researcher in dealing with one may not be useful somewhere else.

It goes without saying that not all the changes in the direction set by the ECHR are a direct consequence of the Convention system, as different situations can be distinguished: (1) where the ECHR (as interpreted by the Strasbourg case law) was at the root of the change¹¹⁴; (2)

¹¹³Some member states have a reputation for keeping such information very poorly. For example, as regards the economic success that took place in Italy in the late 1970s the author Luigi Barzini pointed out with amusement that it just happened "without any public explanation or scientific exegesis foreigners could study", and he added that "There were no reliable statistics". See: Luigi Barzini, The Impossible Europeans, (1983), 168.

¹¹⁴For example: evidence of the cases labelled as (1) concerns the directly positive effect of the ECHR as can be seen in the list of laws that have been passed to bring domestic law in line with the Convention, such as reforms prompted by Strasbourg findings against the state that carries out the reform. Let us take Italy (Alessandro Bernardi and Francesco Palazzo, "Italy" in Mireille Delmas-Marty (ed.), The European Convention for the Protection of Human Rights: International Protection versus National Restrictions, (1992), 196-7), where after the *Ciulla* case, Parliament passed law 3.8.1988 n. 327, amending Article 6 of the 1956 law, abolishing the special form of detention at issue in the *Ciulla* case; and in addition, Articles 314 and 315 of the new Code of Criminal Procedure, which came into force on October 24, 1989, confer a right to compensation for wrongful detention under certain circumstances. In the same country, *Bezicheri* ((1990) 12 EHRR 210) appears to have promoted changes under Article 299 (3) of the new Italian Code of Criminal Procedure, which came into force on October 24, 1989, requiring that the judge rule within 5 days on any application by the accused seeking his or her release from detention on remand. In the United Kingdom, after the *Golder* case, the Prison Rules 1964, in force in England and Wales, were amended and instructions were given to prisons in Scotland and Northern Ireland. The *Sunday Times case* *Nc.1* ((1979-80) 2 EHRR 245) promoted the new Contempt of Court Act (1981 c 49). For further details on the United Kingdom, see: L. H. Leigh, "United Kingdom", in Mireille Delmas-Marty (ed.), The European Convention for the Protection of Human Rights: International Protection versus National Restrictions, (1992), 273. In addition, after the *Case of Young, James and Webster* ((1982) 4 EHRR 38), the ruling of the European Court of Human Rights held that United Kingdom legislation which permitted the operation of union closed shops breached the rights of employees to freedom of association and other political considerations led to the substitution of the Employment Act 1980 (1980 c 42) by the Employment Act 1982 (1982 c 46). The new provisions, however, left the rights of the individual employee to be deduced as a consequence rather than stating his rights to freedom of association. The doubt as to whether this legislation satisfied the requirements of the Convention came from the "residual" approach to individual liberties in the United Kingdom. The *Dudgeon* case is another example, as it prompted the Homosexual Offences

where the ECHR played a marginal role; (3) where the ECHR played no direct role but the domestic law evolved in such a way that it complies with European law¹¹⁵; and (4) where the ECHR was powerless to amend the law or to prevent an unfavourable development.¹¹⁶ In addition, there are questions concerning any legislative effort which also apply to reforms prompted by ECHR, such as whether the reforms have sufficient breadth¹¹⁷; the changes are

(Northern Ireland) Order 1982, which entered into force on December 9, 1982, "decriminalising" in Northern Ireland homosexual acts in private between consenting males aged 21 or over, subject, however, to certain exceptions concerning mental patients, people in the military and merchant sailors. Another example of the influence of Convention law can be seen in the discussion of the Prisoners and Criminal Proceedings (Scotland) (Bill HL 2 R 19 May 1992), where among other things, clause 2 introduced arrangements to change the law in accordance with the European Court's judgment in *Thynne, Wilson and Gunnell* ((1991) 13 EHRR 666) which dealt with discretionary life prisoners. These prisoners are those sentenced for life partly as a punishment for having committed one or more offences and partly to protect the public. The European Court established that once the punitive grounds no longer hold, the public risk ground must be open to review by a body having the status and constitution of a court.

¹¹⁵A few examples in France, Italy and the United Kingdom will be mentioned. In France, the judgment in *X and Y v the Netherlands* ((1986) 8 EHRR 235) spurred a reform of the Criminal Code. Article 322 of the French Criminal Code restored the equality of sexes within the meaning of Article 14 ECHR when it admitted that author and victim of the crime of rape can be of either sex and also, to the requirement of effective protection as laid down by the European Court in this Dutch case. In Italy, a representative case is Law n. 98 (1974) (protection against telephone tapping) which was passed to protect private life against illicit interferences. Another example, is the trend towards "decriminalisation" and to offer alternatives to prison under European influence, especially under the pressure of the ECHR or the Minimum Rules of the Council of Europe. As a result, the Italian authorities carried out a reform of the penitentiary system in 1975. (Moreover, it has been reported that the civilian legal systems have been trying to limit the scope of criminal law, if only to reduce legal uncertainty or deal with the excessive number of cases, decriminalising and creating alternatives to criminal sanctions. See: Marc Robert, "Inequalities in Sentencing", *Disparities in Sentencing: causes and solutions. Collected Studies in Criminological Research volume XXVI, European Committee on Crime Problems, Strasbourg, (1989), 56.*) In the United Kingdom, the cases *Winterwerp v the Netherlands* ((1979-80) 2 EHRR 387) and *Airey v Ireland* ((1979-80) 2 EHRR 305), where the applicants had contended that the right of persons of unsound mind to be legally assisted was to be read into Article 5(4) ECHR, determined that during the debate on the Mental Health Act (Amendment) Bill there was parliamentary pressure for the addition of a clause guaranteeing legal aid and representation before review tribunals. As regards the effects on society at large, a study of impact could also survey, for example, the newspaper articles on the subject of the ECHR in order to issue some conclusions as to the general awareness of the public of their rights under the Convention system.

¹¹⁶Renée Koering-Joulin and Patrick Wachsman, "France" in Mireille Delmas-Marty (ed.), The European Convention for the Protection of Human Rights. International Protection versus National Restrictions, (1992), 131.

¹¹⁷The point is, however, that laws can be challenged again on grounds that, for instance, they do not fully implement the Convention or better yet, that what was regarded as implementation is not viewed as such any more after some time. Ian McKellen reported in "The Guardian", July 22, 1993, "Through a gay viewfinder" that two British male

respected in practice; and finally, whether the interpretation in domestic courts gives a meaning to the reformed or new laws in accordance with the ECHR or whether under the guise of interpretation the Courts are eviscerating them. The difficulty with a study of law reform prompted by the ECHR (or by the ECHR together with other factors) is that the law may still remain "law in the books" rather than in practice as it is not the adoption of rules but their enforcement what matters. The comparative method applied to the study of the interpretation of case law, as it will be undertaken in this dissertation, can show what happened in practice rather than what it may be theoretically possible according to statutory law, and therefore, provide us with a more complete picture of the emerging shared law of human rights in Europe and its complex interactions with the various legal systems of the member states.

Conclusions

The metaphors contained in the theory of "transplants" provides us with a terminology useful to think abstractly on the (complex) relationship between the Human Rights system of the Council of Europe, the member states and the EU in relation to the interconnections between these systems and their effects on interpretation. The theory, which was developed to study other situations (such as the Reception of Roman law or the situation in Colonial Africa), is also helpful to acknowledge the tension produced by the pull towards one or several systems of human rights protection.

A feature of the theory is that it enables us to see the complex interconnections in more manageable terms, as two-

homosexuals (respectively aged 20 and 25 at that time) were questioning the age of consent before the European Court of Human Rights.

way exchanges. There is the process of "top-down transplantation" which can take place by means of incorporation of a combination of statutes (the ECHR plus the ratified Protocols), but also, rules, principles and case law. Non-incorporation of the Convention does not necessarily mean that a barrier has been raised against the tide of Convention law. In spite of non-incorporation, as soon as the right to individual petition is granted individuals can take their cases to Strasbourg, and as a consequence, at least some effects of the Convention will subsequently permeate all the way down to domestic law in general, and even to the minds of some legal practitioners. The overall effect is to set limits on the powers of the state and this, in turn, tends to be good for human rights protection. The actual combination of elements involved in the transplantation of the Convention is different from country to country. There is also a the process of "bottom-up transplantation" because the Court and the Commission borrow principles from the member states' legal orders, carry out comparative surveys, and the human right organs in Strasbourg are composed of lawyers from diverse legal backgrounds.

On the other hand, from the experience of transplants in other lands and times there are some lessons to be learned apart from borrowing vocabulary. The first is that there are many legal and extra-legal factors active in the member states, such as for example those mentioned by Montesquieu in his work "The Spirit of the Laws" and many more, which require that harmonisation co-exist with diversity. Those factors are the main reason why in many cases it is impossible to avoid inconsistent interpretations of Convention law in the different jurisdictions, both by the domestic and the Strasbourg organs. Besides, and taking into account the considerable differences in size and impact, it should not be forgotten that the "transplantation" of English law to the New

Commonwealth did not turn Africa into England as the Swiss Civil Code did not turn Turkey or Egypt into a Western country.¹¹⁸ Therefore, the "transplantation" of Convention law will not automatically unify all approaches to human rights issues all over the member states of the Council of Europe. The metaphor of "transplants of laws" will be used for a different reason. It helps to make visible the coming into contact of various legal systems, and therefore, to highlight that the comparative method is called into play precisely by this coming together of at least two legal systems in a case. The comparative method is needed for the construction of human rights law in the midst of the overlapping law of the Convention and the protections offered by national law (and other international instruments), between "transplants" imposing "top-down" European standards and "infiltrations" of "bottom-up" national singularities, between tendencies to one and to several European systems. The existence of these various relationships shows that the interpretation of ECHR law in a contrasting environment and that the comparative method plays a double role in Convention law, as a tool of interpretation and of study. As regards the latter use, the comparative method will show how the civilian and common law elements are enunciated in the case law, how they finish up in the confrontation with one another and how they eventually influence outcomes. The comparison between the approaches of the legal systems relies on the assumption that the civil law and the common law still differ.

As it was said of the EU system, here too, "The European judicial process, characterized by a symbiotic relationship between national courts and the Court of Justice, is a complex dialectic process - even more intricate than that of a divided-power national judicial

¹¹⁸F. P. Walton, *op. cit.*, 191.

system such as a federation."¹¹⁹ The notion of a "dialectic process" in human rights protection also runs through this dissertation and will be discussed in the ensuing chapters, however, one difficulty will always persist in any analysis of Convention law, and that is the factor of indeterminacy in a system where "transplants" take place as "tides" and which is in constant mobility.

¹¹⁹Eric Stein, "Lawyers, Judges and the Making of a Transnational Constitution", (1981) 75 AJIL 1, 1.

The effect of the European law of human rights on the member states

*A quoi bon une Convention
européenne des Droits de l'Homme?
Nous sommes en démocratie. A quoi
bon une Cour européenne puisque nos
tribunaux assurent
traditionnellement le respect, la
défense des libertés publiques et
des libertés privées?*¹²⁰

*However responsive and just
domestic law may be, there is and
will remain the need for a kind of
international long-stop. This may
be peculiarly true of Britain,
which does not afford the courts
the constitutional opportunity to
review much official practice.*¹²¹

Introduction

The ECHR has been introduced into the member states to a varying extent and by different means, and it is described in this chapter as "transplanted law" in order to explain its incursion in domestic law as "an incoming tide."¹²² The purpose of this chapter is to review the position and uses of the "transplanted" ECHR in municipal law, particularly the difficulties in its application by the

¹²⁰Some European politicians in the 1950s, quoted by Judge Louis-Edmond Pettiti, "L'invocation de la Convention européenne devant les juridictions nationales", in: Mady Schaffer, L'Avocat et l'Europe des 12 et des 21. La Défense des droits de l'homme: L'intégration communautaire perspectives 1992, (1990), 111.

¹²¹Cedric Thornberry "Why the law needs an international long-stop", The Times, November 29, 1973.

¹²²On EU law, see: *H. P. Bulmer v. J. Bollinger SA*, [1974] 1 Ch. 401, 418. See also Chapters 2 and 11 of this dissertation.

domestic courts in three member states¹²³ of the Council of Europe: France, Italy and the United Kingdom (which includes different legal orders in neither of which the ECHR has been incorporated).

The investigation will concentrate on whether, "directly" incorporated or not, the ECHR assists national courts in the construction of domestic law and also, on how the judiciary spells out the nature and validity of the ECHR. The study is divided in two parts, as follows: (i) the expansion of the ECHR through infiltration in domestic law (aspects concerning the law in the books), and (ii) how it fared in its encounters with (existing) national law as it appeared in domestic cases where it was invoked. The method has some similarities with studies on EU law where a supranational law penetrates the EU countries:

First is the dimension of formal penetration, the expansion of (1) the types of supranational legal acts, from treaty law to secondary community law, that take precedence over domestic law and (2) the range of cases in which individuals may invoke community law directly in the domestic courts. Second is the dimension of substantive penetration, the spilling over of community legal regulation from the narrowly economic domain into [other] areas¹²⁴

Finally, the question whether a harmonised application of a European law of human rights throughout the member states is attainable will be addressed. The issues include whether the differences in the interpretation of this transplanted law are bound to exist indefinitely and whether it may be appropriate to conclude (from the survey of the domestic case law) that the ECHR law and the Strasbourg system fulfil the role of a shared European law of human rights.

¹²³Incidentally, these three countries, together with Germany, provide almost fifty percent of the caseload at Strasbourg.

¹²⁴Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration", (1993) 47 International Organization 41, 43.

Part I: the expansion of the ECHR through infiltration in domestic law. Some aspects concerning the law in the books.

(a) Constitutional provisions

The constitutional law provisions in the member states introduce their share of the pull of diversity into the process of the interpretation of the ECHR. The "spirit" of constitutional law is different in each country as each jurisdiction has its own way of handling issues of rights and freedoms. In France, the Constitution of the Fifth Republic (1958) stresses in its Preamble that "The French people solemnly proclaim their attachment to the Rights of Man and to the principles of national sovereignty as defined in the Declaration of 1789, confirmed and extended by the Preamble to the Constitution of 1946", and its Article 2 states "the equality of all citizens before the law, without distinction of origin, race or religion". The French Constitution does not contain a list of rights such as the Italian, but makes references to the Declaration of the Rights of Man and of the Citizen of 1789, which sets forth "in a solemn declaration, these natural, inalienable and sacred rights of man", and to the Preamble of the Constitution of 1946, where "the French people proclaim once more that every human being, without distinction of race, religion or belief, possesses inalienable and sacred rights."¹²⁵

The Italian Constitution of 1947 states in similar vein that: "The Republic acknowledges and guarantees the inviolable rights of man both as an individual and in the social organisations where his personality is developed [...]" and "All citizens have equal social rank and are

¹²⁵English version from: George A. Berman, Henry deVries and Nina M. Galston French Law: Constitution and Selective Legislation

equal before the law without distinction." Freedoms are listed too, some of which are the inviolability of personal liberty and personal domicile, the right of association, freedom of speech and the press, freedom of religion, education, the right of all citizens who are of age to vote, and the like.¹²⁶

Conversely, the constitutional position in the United Kingdom is in sharp contrast with the French and Italian approaches because the United Kingdom has a constitution composed of a scattered mixture of legislation, case law, customs and conventions.¹²⁷ In fact, England epitomises the common law style, providing remedies and avoiding the affirmation of rights and liberties. We should consider, for example, the British answer to the Secretary General of the Council of Europe who, pursuant to Article 57 ECHR, asked the member states to indicate how their domestic law gave effect to the provisions of the ECHR. The United Kingdom answered in 1966 sending a list of statutes starting with Magna Carta.¹²⁸

It is well-known that the United Kingdom Parliament has absolute theoretical power to enact or change any law at will. Moreover, in England and Wales courts do not recognise any higher legal order by reference to which parliamentary legislation could be held void, although, because of British membership in the EU, EU law either in the form of legislation or rulings of the ECJ, is an integral part of the domestic legal systems of the United

¹²⁶Part 1 of the Italian Constitution is labelled "Rights and Duties of Private Citizens" and sets out extensively the rights and freedoms recognised in the country, using two formulas to introduce those rights "everyone has a right to" or "the citizens have a right to".

¹²⁷Colin R. Munro, Studies in Constitutional Law, (1987), 1.

¹²⁸British Government, "Application de l'Article 57 de la Convention Européenne des Droits de l'Homme - Royaume-Uni - Réponse du 13 septembre 1966", September 13, 1966, Council of Europe document H (66) 9, Addendum 2.

Kingdom and has overriding power over opposing legislation.¹²⁹

(b) The position and uses of the ECHR in domestic law

The diverse constitutional provisions, together with the national legal order in general will necessarily affect the *position* of the ECHR in municipal law, and this, in turn, will have implications for the authority of the ECHR in a particular legal system and on the source of this authority. The *use*, i.e. the capacity of the Convention law to alter, in the hands of domestic judges, the interpretation and the solution that municipal law would have offered otherwise, will depend on the position held by the ECHR in domestic law.

The position of the ECHR is linked to the standing of international law in municipal law. France, and also Belgium and Holland, are monist countries, therefore, an international treaty approved by the state and which has entered into force on the international plane will automatically become part of the law of the state without any "incorporation" or "transformation". In France the courts may take the view that an issue arising out of the interpretation of a treaty is for the executive to clarify and consequently, put a question of interpretation to the executive branch of government when in doubt. Italy, as well as Germany, requires the transformation of a treaty by an act of Parliament if it is to have any effect in domestic law. All subsequent effects of the treaty can then be attributed exclusively to the domestic statute of

¹²⁹Since *Factortame v. Secretary of State for Transport* ([1991] 1 AC 603.) injunctive relief is also available against the Crown while a preliminary ruling from the ECJ made under Article 177 EC is awaited.

incorporation. In the United Kingdom¹³⁰, and also in Denmark, the dualist system entails that a treaty as such has no effect in domestic law unless there is a national rule making provision for its incorporation.

(c) Human rights in domestic law

The Strasbourg human rights system emphasises the national authorities' task of securing the rights laid down in the ECHR by reviewing the acts and omissions of national governments. In any given human rights case, national judges are to apply municipal law in the first place - and we should add, as well as the Convention law that has managed to percolate through to domestic law. The success of the national authorities in doing so depends on whether, among other factors, the stipulations of the ECHR can be claimed in proceedings before municipal courts, an issue connected to the effect of international law within the national legal order.¹³¹ This brings us to the way the ECHR is transplanted¹³² into the legal systems of the member states and how it "grows" in different "soils". The infiltration in domestic law varies from country to country, where different legal cultures¹³³ determine that

¹³⁰Treaties are made under the prerogative powers of the Crown and do not become *per se* part of English law. A treaty that requires a charge on public funds or an alteration of English law cannot be enacted without Parliament passing the appropriate legislation by Statute. English courts will not apply a treaty unless there is an enabling statute. See: sir Robert Jennings, "Human Rights and Domestic Law and Courts" in: Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda, 296-7, and also, R. Higgins, "United Kingdom" in: the United Kingdom National Committee of Comparative law (eds.), The Effect of Treaties in Domestic Law, 123.

¹³¹P. van Dijk and G. J. H. van Hoof, Theory and Practice of the European Convention on Human Rights, 14.

¹³²This word is an image used to name the law that is not a direct creation of a national legal system but comes to it from an international legal order.

¹³³A comparison may be made here with the EU. Dr. Ludwig Krämer, of DGXI, EU Commission, pointed out the difficulties that the EU faces in translating directives into different legal systems during the examination with regard to environmental protection legislation carried out by the Select Committee on the European Communities of the House of Lords, on October 15, 1991. HL 53-II, (1991-92), 12.

the Convention be differently absorbed, integrated, and even perceived.¹³⁴

The "top-down" transplantation encounters a host of different legal and political systems with a particular approach to rights and freedoms that cause the existence of a thousand and one ways of implementing the ECHR. As the European Court remarked in the 1976 case *Swedish Engine Drivers' Union v Sweden*¹³⁵ "[N]either Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention". Its effects on the internal legal orders varies because while some states have entrenched bills of rights, others have resorted to incorporation or have contented themselves with the provision of remedies and those differences affect the operation of the ECHR.

In those countries where the ECHR is part of municipal law, the operation of self-executing¹³⁶ provisions and those which are not is necessarily different. Only those self-executing rules can be directly invoked in court¹³⁷ without the assistance of the local legal system. Unfortunately there is no unambiguous way to tell one from

¹³⁴The familiar distinction between the dualistic and monistic positions on the relationship between international and municipal law must be recalled once again. The dualistic view understands the international and national legal systems as two separate orders. International law has effect within the national legal system only after it has been transformed into national law. If the constitutional law of a state gives internal effect and priority to international law, international law has this status by virtue of that constitutional law, not by virtue of its own nature. On the other hand, the monistic view takes all the various legal systems of the world as being components of a global legal system in which national authorities are bound by international law even in their relations with individuals, regardless of the transformation of international law into national law. Individuals can directly invoke rules of international law in national proceedings, which must be applied and given priority over contrary municipal law. Let us remember that the monistic view is not required by international law at its present stage of development and that this observation applies to the European system of human rights.

¹³⁵(1979-1980) 1 EHRR 617, 631.

¹³⁶A self-executing treaty is one which does not require legislation or any other action by the contracting states to make it operative internally as part of their municipal law. Whether a treaty is self-executing or not is a question of interpretation.

¹³⁷A. H. Robertson, Human Rights in National and International Law, (1968), 22 - 27.

the other, so the distinction must rely on the wording of the rule and the context in which it has been transplanted. Besides, a provision can be self-executing in one country and not in another. To begin with, the provisions set down as an "obligation to refrain" are operational without any further legislation. Take the example of the provisions whereby "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"¹³⁸, "No one shall be required to perform forced or compulsory labour"¹³⁹, "No one shall be deprived of his liberty save in the following cases"¹⁴⁰ and "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."¹⁴¹ These provisions contain prescriptions which afford specific protections that could be claimed as they stand in any member state where the ECHR has become part of the local legal system.

In other cases, however, the terms of the ECHR *per se*, without a basis in national law, are not sufficient to afford protection. For example, the exigency that the member states "hold free elections at reasonable intervals by secret ballot"¹⁴² or the provisions that grant judicial or administrative options for the individuals to challenge decisions affecting their rights.¹⁴³ To assert such rights individuals must therefore rely on the provision by the member states of competent authorities with jurisdiction and appropriate procedures to channel claims. Likewise, the clauses that authorise governments to take certain measures which restrict rights and freedoms on condition that they are applied "in accordance with a procedure

¹³⁸Article 3 ECHR.

¹³⁹Article 4 (2) ECHR.

¹⁴⁰Article 5 (1) ECHR.

¹⁴¹Article 5 (2) ECHR.

¹⁴²Article 3 Protocol 1.

¹⁴³Articles 5 (3), 5 (4) and 13 ECHR.

prescribed by law"¹⁴⁴ or that they are "in accordance with the law"¹⁴⁵ all need help from national law. Similarly, the requirements of judicial control laid down in Articles 5 and 6 ECHR cannot establish as such the jurisdiction of any given court. Their open-ended terms are exposed to the influences of the local "soil": the notions of "judge" and "court" or the manner in which judicial control is exercised are bound to be different in the various "soils". As a consequence, the provisions concerning the "determination of civil rights and obligations or any criminal charge" or, to give another example, "a fair and public hearing"¹⁴⁶ will perforce have different connotations in different member states.

EU law is different in this respect.¹⁴⁷ The relation between the national courts and the ECJ is more direct than with Strasbourg. The ECJ has taken the view that directly applicable provisions in the EEC Treaties and in the decisions of EU institutions have internal effect regardless of the characteristics of each particular national legal system. The rules that form the core of EU law have priority over all provisions of national law, even constitutional.¹⁴⁸ No doubt the case could be made that the EEC Treaties strong at producing a "shared" or

¹⁴⁴Article 5 (1) ECHR.

¹⁴⁵Articles 8, 9, 10 and 11 ECHR.

¹⁴⁶Article 6 ECHR.

¹⁴⁷The ECJ does not review the municipal law of the EU member states, and when it judges the validity of the acts of the EU institutions it does so by reference to EU law and not to the law of the member states. The relationships between the EU and its member states are governed by EU law. No doubt reference to the law of the member states in those circumstances would have a negative effect on the uniformity or efficacy of EU law. See: *Internationale Handelgesellschaft* (1970) ECR 1125 and *Hauer* (1979) ECR 3727.

¹⁴⁸Nonetheless, sometimes co-existence and co-operation between the EU and the member states is not so easy. Germany's Federal Constitutional Court, before the ratification process of the Maastricht Treaty was completed, heard complaints alleging that ratification would breach the German Constitution. The point is, however, that the issue was raised and addressed by the Constitutional Court. In its complex and rather long ruling in the case *Manfred Brunner and Others v. The European Union Treaty* ([1994] 1 CMLR 57) the Court rejected such claims. It stated, *inter alia*, that the sharing of human rights protection of German citizens between Germany and the EU does not dilute the rights guaranteed by the German Constitution and it also recognised that, in a relationship of co-operation with the ECJ, both courts guarantee the constitutional protection of such rights.

harmonised *ius commune* in view of their purpose of generating legislation intended to abolish differentials throughout the member states in their area of coverage. In contrast, the ECHR lacks *per se* overriding power over domestic legislation.

Part II: the case law on how the ECHR fares in its encounters with national law. Domestic cases where it was invoked in France, Italy and the United Kingdom.

(a) France

Owing to a traditional distrust of the judiciary, based on historical reasons, the accepted belief in France¹⁴⁹ was that statutes were inviolable.¹⁵⁰ The position was based on the French understanding of the separation of powers, which required that the judicial system, statutorily created, be bound by statute to give effect without question to the laws passed by Parliament and prohibited from applying any conflicting rule whether it be a constitutional or treaty stipulation. There was a "fissure" in the system, however, from which the ECHR started to percolate through. The traditional position on the inviolability of the laws was inconsistent with the apparently clear constitutional provisions that gave

¹⁴⁹France signed the Convention on November 4, 1950, but ratified it only on May 3, 1974, when it also accepted the compulsory jurisdiction of the European Court of Human Rights in accordance with Article 46 ECHR. The right of individual petition was recognised on October 2, 1981, when France made the declaration provided for in Article 25 ECHR. The ECHR was ratified by the decree No. 74-360 of May 3, 1974 and published with the additional Protocols # 1, 3, 4, and 5 as well as the reserves of the French Government at the time of the ratification. After that moment, other Protocols entered into force, Protocol # 2 (Decree No. 81-917 of October 9, 1981), # 6 (Decree No. 86-282 of February 28, 1986), #7 (Decree No. 89-37 of January 24, 1989) and # 8 (Decree No. 90-245 of March 14, 1990). Protocol # 9 signed in Rome on November 5, 1990, has not entered into force yet). (From: D.1992.Somm.129)

¹⁵⁰James Beardsley, "Constitutional Review in France", (1975) *The Supreme Court Review* 189, 254.

international treaties an authority superior to domestic statutes.

In spite of the rules of Article 55 of the Constitution, the doctrine of the inviolability of the statutes determined that the three supreme courts¹⁵¹ (the Constitutional Council, the Court of Cassation and the Council of State)¹⁵² did not accept at first the pre-eminence of international law. When they eventually did, it was not in a single and synchronised stroke. The uncertain state of the law lasted until the Council of State decided the *Nicolo*¹⁵³ case in 1989. As time passes domestic statutes will probably keep losing further their "sacred" character and give more way to European law in the area of human rights,¹⁵⁴ as the new *jurisprudential* position makes plain that various areas of the law are increasingly under the European law "flood".

According to the Constitution, a treaty or an agreement, having received legislative approval in the form of a statute, from the day of its publication¹⁵⁵, possesses a

¹⁵¹ It may be argued that this is not an usual typology, however, in this context it means that the three courts are the highest courts of the land in France. Each one of them is a court of last resort within its own jurisdiction. The Court of Cassation and the Council of State are at the top of the ordinary and administrative courts, respectively. Although the Constitutional Council is not at the top of a hierarchy of courts, it was set up by the Constitution of 1958 to make sure that the Constitution is respected by the other branches of government. It is a supreme tribunal in the sense that there is no appeal against its decisions. Also relevant for this stage are: Y. Madiot, "Du conseil constitutionnel à la convention européenne: vers un renforcement des libertés publiques?" D.1975.C.1, R. Merle, "La convention européenne des droits de l'homme et la justice pénale française", D.1981.C.227, Jean Rivero, Le Conseil constitutionnel et les libertés, (1987) and John Bell, French Constitutional Law, (1992).

¹⁵² All the French courts are named in English for reasons of consistency: the English name of the domestic courts of all the non-English-speaking countries mentioned in this dissertation will be used whenever there is one available.

¹⁵³ Roger Errera, "Recent Decisions of the French Conseil d'Etat", [1990] PL 134.

¹⁵⁴ Jean-François Touchard, "A propos de l'arrêt Nicolo", (1990)106 *Revue de Droit Public et de la Science Politique* 801, 808.

¹⁵⁵ The French Constitution knows three categories of treaties: those subject to ratification with legislative approval; those subject to ratification without legislative approval; and those only requiring publication. To become applicable, an international agreement needs just one formality, publication, even if this publication is made by an international institution. Courts will only apply a treaty which has been "published" (as it happened to the ECHR on May 3, 1974) because publication is the way to bring it to the attention of those affected by it. See J. D. de la Rochère, "France", in: F. G. Jacobs and S. Roberts (eds.), United Kingdom

hierarchically superior position over both prior and subsequent conflicting legislation. Article 55 states that application of the treaty is conditional upon its reciprocal application by the other signatories.¹⁵⁶ Under Article 54 the President of the Republic, the Prime Minister or the President of either House of Parliament can refer treaties to the Constitutional Council for determination of their constitutionality.¹⁵⁷ Finally, Article 53 deals with the approval by statute of various types of treaties.¹⁵⁸ The case law was not, however, a reflection of these provisions.

Until it decided to change its *jurisprudence*, the **Court of Cassation**¹⁵⁹ followed what was called the "Matter doctrine"¹⁶⁰ on the inviolability of statutes so that in the case of a conflict between a statute and a treaty, courts were bound to apply the statute. A few months after the Constitutional Council's decision of January 15,

National Committee of Comparative Law, The Effect of Treaties in Domestic Law, volume 7, (1987), 42.

¹⁵⁶The English translation of all the articles of the French Constitution of 1958 are from: Constitutions of the World, volume V, Blaustein & Flanz ed. Oceana Publications, New York, 1988. Article 54 of the French Constitution: "Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of statutes, subject, for each agreement or treaty, to its application by the other party."

¹⁵⁷Article 54 of the French Constitution reads: "If the Constitutional Council, the matter having been referred to it by the President of the Republic, by the Premier, or by the President of one or the other assembly, shall declare that an international commitment contains a clause contrary to the Constitution, the authorisation to ratify or approve this commitment may be given only after amendment of the Constitution." Since the constitutional reform of October 29, 1974, a group of 60 deputies or 60 senators can submit legislation to the Constitutional Council, as Article 61 of the French Constitution sets down that: "Organic laws, before their promulgation, and regulations of the Parliamentary assemblies, before they come into force, must be submitted to the Constitutional Council, which shall rule on their constitutionality. To the same end, laws may be submitted to the Constitutional Council, before their promulgation, by the President of the Republic, the Premier, the President of the National Assembly, the President of the Senate or by 60 Deputies or 60 Senators."

¹⁵⁸Article 53 of the French Constitution: "Peace treaties, commercial treaties, treaties or agreements relative to an international organisation, those that imply a commitment for the finances of the States, those that modify provisions of a legislative nature, those relative to the status of persons, those that call for the cession, exchange or addition of territory may be ratified or approved only by statute."

¹⁵⁹The English name is used whenever there is one available, for the sake of consistency and clarity when dealing with the domestic courts of the various member states of the Council of Europe.

¹⁶⁰Roger Errera, *id.*, 135.

1975, the Court of Cassation had to pass judgment in the case *Administration des Douanes c. Société J. Vabre*¹⁶¹ in which the supremacy of EU law was disputed. The Court of Cassation (in *chambre mixte*) held that Article 95 EEC took precedence over a subsequent French statute.¹⁶² This case purported to be a confirmation of the provisions of the Constitution; however, it was based on the case law of the ECJ, particularly *Costa v ENEL*.¹⁶³ All the ensuing case law of the court followed this new line of reasoning which set aside the inviolability of statutes as far as international law (and, therefore, the ECHR) was concerned. In French law:

Based on the traditional denial of judicial review of constitutionality of (parliamentary) legislation, French *lois*, once promulgated, are not subject to court control; they are unchallengeable and supreme, no matter whether they violate the French constitutional texts, and, in particular, the sacred French texts and traditions on *droits de l'homme*. Since *Cafés Jacques Vabre*, however, this basic prohibition can no longer bind the judges of France to the extent that French legislation is in conflict not with the French texts and traditions, but with a transnational bill of rights, the European Convention on Human Rights.¹⁶⁴

A typical case in which the **Constitutional Council** supported the traditional French position of inviolability of statutes is a decision of January 15, 1975.¹⁶⁵ The internal legislation (Section 4 of the Voluntary Termination of Pregnancy Act) was challenged as not being in conformity with Article 2 ECHR. The Constitutional Council refused to examine the issue on grounds that the alleged failures of the legislature to respect international treaty law were not within its authority, as a statute contrary to an international treaty was not *per*

¹⁶¹(1975) 2 MLR 336.

¹⁶²In this case, Article 265 of the French customs code.

¹⁶³*Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, case 6/64, (1964) CMLR 425.

¹⁶⁴Mauro Cappelletti, "The 'Mighty Problem' of Judicial Review and the Contribution of the Comparative Analysis", (1980) 53 Southern California Law Review 409, 420.

¹⁶⁵D.1975.529.

se unconstitutional. Its task was to review the constitutionality of legislation, the Council said, but not the conformity of legislation to treaties. The pronouncement had been made upon reference by a parliamentary minority who had argued from autochthonous constitutional law, the Preamble of the 1958 Constitution and from principles of substantive European human rights law¹⁶⁶ that the right to life included the life of the foetus. The Constitutional Council explored the constitutional issues in relation to the ECHR's operation in France and found that Article 55 of the French Constitution gave treaties an authority superior to statutes but did not require or imply that respect for this criterion be assured under Article 61. The Council reasoned that it would be improper to declare the nonconformity to the Constitution in the terms of Article 61 and preclude the promulgation of a statute which was only inconsistent with treaty obligations.¹⁶⁷ It also drew a distinction between the review of constitutionality which determines validity and has absolute effects, and the review of the conformity of legislation to a treaty that determines applicability and has relative effects. The latter fell outside its jurisdiction and it was for the ordinary judiciary, administrative or *judiciaire* to rule on the matter. Article 55 did not confer constitutional force upon the ECHR (the ratified treaty), and moreover, Article 54 suggested that treaties lack such force since they may be constitutionally challenged. In the end, it maintained the constitutionality of the disputed section of the domestic statute (the abortion law) by holding that it had no jurisdiction to review because the incompatibility of internal legislation with the ECHR was not a case of unconstitutionality.

¹⁶⁶Article 2 ECHR: "Everyone's right to life shall be protected by law."

¹⁶⁷James Beardsley, *id.*, 236.

Only after 1975 did the case law slowly start to change, when this court began to accept a number of cases in which it had to look at whether a statute conformed with a treaty, especially when the statute was directly related to the implementation of that treaty.¹⁶⁸ The very important change, however, took place in the landmark decision *Election du député de la 5e. circonscription du Val d'Oise* in 1988, where the Council made it clear that it was willing to review the conformity of a domestic statute with a treaty, the ECHR:¹⁶⁹

Considérant que, prises dans leur ensemble, les dispositions de la loi n° 86-825 du 11 juillet 1986, qui déterminent le mode de scrutin pour l'élection des députés à l'Assemblée nationale, ne sont pas incompatibles avec les stipulations de l'article 3 du protocole n° 1 additionnel à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales; qu'il appartient, par suite, au Conseil Constitutionnel de faire application de la loi précitée;¹⁷⁰

A commentator wrote that it was very important that the Strasbourg *jurisprudence* also be followed, otherwise, contradictory case law and different readings, detrimental to a shared European public order, cannot be avoided.¹⁷¹

The **Council of State**, on the other hand, was the last court to bring its case law in line with the Constitutional Council and the Court of Cassation. In the *Nicolo*¹⁷² case, it finally departed from the case law on the inviolability of statutes, and accepted jurisdiction to review the validity of a statute in relation to a treaty. The old *jurisprudence* had strictly adhered to the

¹⁶⁸Roger Errera, id., 134.

¹⁶⁹Actually, Article 3 of Protocol 1.

¹⁷⁰Decision number 88-1082/1117 of October 21, 1988, JORF, 25.10.88, p. 13474.

¹⁷¹Dominique Rousseau, "Vers un ordre juridictionnel européen des droits et libertés? L'intégration européenne des Droits de l'homme au bloc de constitutionnalité", in: Dominique Rousseau and Frédéric Sudre (eds.), Conseil Constitutionnel et Cour européenne des droits de l'homme: droits et libertés en Europe, (1990), 129.

¹⁷²[1990] PL 134, 135.

principle *lex posterior derogat priori* and therefore, a treaty or a statute subsequent to another statute or treaty as case may be took precedence over the previous piece of legislation. This traditional position was laid down in cases such as *Syndicat Général des Fabricants de Semoule de France*¹⁷³, *Union Démocratique du Travail*¹⁷⁴ and *Élection des représentants à l'assemblée des communautés européennes*.¹⁷⁵

As an example of the old position, but dealing with the ECHR, in the case of *Mrs. L...*¹⁷⁶ the Council of State reached the conclusion in 1980 that the abortion law of 1975, which was passed after the publication of the ECHR, should be given priority over the Convention in accordance with the principle of *lex posterior derogat priori*.

We finally arrive at the watershed case on the position of international law, *Nicolo*. Mr. Nicolo asked the Council of State to annul the 1989 election to the European Parliament arguing that a 1977 French statute, the electoral law, was in violation of the Treaty of Rome. The issues in these case were two: (i) whether the *juge administratif* had jurisdiction to determine whether a domestic statute is compatible with the clear stipulations of an international treaty and if so, (ii) whether the challenged electoral law, making one single constituency out of the French territory including overseas *départements et territoires* was compatible with the clear stipulations of Article 277 (1) EEC. The Court answered both questions in the affirmative and found that the

¹⁷³Conseil d'État, March 1, 1968, # 62814, (1968) Recueil Lebon 149.

¹⁷⁴Conseil d'État, October 22, 1979, # 17541, (1979) Recueil Lebon 383.

¹⁷⁵Conseil d'État, October 22, 1979, # 18449,18546,18573,18581,18582, (1979) Recueil Lebon 385.

¹⁷⁶D.1981.J.38. In this case, Mrs. L... obtained an abortion while being in the process of divorcing her husband whom she had left some time before the abortion took place. Mr. L... claimed to the *Tribunal Administratif* that the abortion was performed in violation of the right to life of Article 2 ECHR. The court held that neither domestic provisions nor the ECHR have been violated.

electoral statute was not contrary to Article 227 (1) EEC. Mr. Nicolo had argued that articles 277 (1) and (2) EEC meant that the instrument applied only to the European and not overseas territory of France, hence the illegality of the election.

The report of the *Commissaire du gouvernement* cast light on several important issues. It is worth stating that his report confirms what has been said up to this point about the position of international law in French law. The document relates the proposed solution (which was adopted by the Court) to the general pattern of the case law and anticipates its future development, pointing out that up to that moment the Council of State's interpretation was that any statute passed after the publication of a treaty should be given priority in accordance with the principle of *lex posterior derogat priori* as follows:

On sait que vous avez jugé, à cet égard, par une célèbre décision du section du 1er mars 1968, *Syndicat général des fabricants de semoules de France* [...] que le juge administratif ne peut faire prévaloir les traités sur les lois postérieures qui leur sont contraires.

The *Commissaire* highlights the two prongs of the Council of State's now old approach. One was Article 10 of the statute of 16 and 24 August 1790 which forbids judges to suspend the application of domestic statutes, while the other was that, if the 1958 Constitution departed from the theory of the inviolability of statutes, then, review was in the hands of the Constitutional Council and not of the Council of State. The *Commissaire* advocates bringing the Council of State's *jurisprudence* into step with the Court of Cassation and the Constitutional Council. As for the Court of Cassation's case law:

Ce faisant, vous ne feriez que rejoindre la pratique suivie par les juridictions judiciaires. On sait, en effet, que par un important arrêt de chambre mixte du

24 mai 1975, *Administration des Douanes c. Société des Cafés Jacques Vabre* [...] la Cour de Cassation a [...] adopté cette même solution [which is the solution proposed by the *Commissaire*].

The *Commissaire* also pointed out to the judges of the Council of State that the Constitutional Council had already brought its case law in line with the new interpretation:

[...] puisque à l'occasion d'une importante décision du 21 octobre 1988, *Election du député de la 5e. circonscription du Val d'Oise* [...] le Conseil Constitutionnel a clairement explicité sa pensée en acceptant de contrôler, par voi d'exception, la conformité d'une loi à un traité [...]

Finally, the *Commissaire du gouvernement* makes an appeal to cartesian logic in a sentence that incidentally, says a great deal about the French judicial style: "La France ne peut simultanément accepter des limitations de souveraineté et maintenir la suprématie de ses lois devant le juge: il y a là un illogisme que votre décision de 1968 nous paraît peut-être avoir sous-estimée."

Nicolo and the new reading of Article 55 of the Constitution involve the acceptance of the primacy of international law (in general) over domestic statutes which therefore, lose their status as the cornerstone of the legal system. As all other international law instruments, the authority of the ECHR in France over opposing legislation derives not directly from international law but from the position of international law vis-a-vis the domestic legal system in accordance with the French Constitution read as to give full effect to Article 55. Since the ECHR seems to have been assimilated into the French legal system as a law of constitutional status, the three supreme courts are now agreed, and French courts recognise the right to claim the application

of the provisions of the ECHR and its Protocols before a domestic court.

French courts also eliminated the double standard of their Italian counterparts: in Italy, EU legislation has priority over any opposing legislation by way of making an exception¹⁷⁷ while the ECHR (and the rest of international law) is denied such status. The reason for this is that in Italy the general rule dictates that incorporated international law has the same strength as the ordinary statute of incorporation. The French constitutional order does not make distinctions between international law and EU law.¹⁷⁸

Thus the ECHR was transplanted into the French legal order. Let us now turn to the issue of how it appears to be taken root. In a line of case law dealing with transsexualism, the civil chamber of the **Court of Cassation**, has been adopting decisions which are not unlike the European Court's ruling in *B. v. France*. After this Strasbourg decision there were two sets of views clearly set side by side in France. On the one hand, the accepted French position which stressed the inviolability of the civil status of a person and therefore, rejected the possibility of making any changes to the registrations concerning the civil status of a person after a sex-change operation. For example, in *Mme. X ... c. Proc. Rép. Bordeaux*¹⁷⁹ Article 8 ECHR was not used to protect the right of privacy and order the rectifications sought. Although Cassation did not admit the rectification of civil status, some lower courts did, and since sometimes the *procureur général* did not appeal from such judgments they became *res judicata*. Judge Pettiti pointed out in his dissent in *B. v. France* that:

¹⁷⁷See case *Frontini c. Ministero delle Finanze* discussed below.

¹⁷⁸Andrew West et al., *The French Legal System*, (1992),166-7.

¹⁷⁹D.1991.J.169.

Subsequent to these decisions by the Court of Cassation [he refers to 4 decisions passed in 1990 where it refused to order the rectification of the civil status of transsexuals], the Colmar Court of Appeal granted rectification of civil status to a person who had in addition after the operation obtained an amended passport showing her new sex. No appeal having been brought by the *procureur général*, the decision is final and binding and rectification of civil status has taken place.¹⁸⁰

On the other hand, the European Court re-focused the issue in *B. v. France* as it based its judgment on the right of privacy under Article 8 ECHR. The balance achieved gave more weight to the right to privacy against the inviolability of civil status as it did not afford France a margin of appreciation sufficiently wide to refuse changes to the civil status as the Court of Cassation was doing. In December 1992, two domestic cases recognised the right of two post-operative transsexuals to make all the necessary changes in their documents to show the newly acquired sexual identity although Cassation did not acknowledge a European influence on the judgment. The carefully worded decisions in *René X*.¹⁸¹ and *Marc X*.¹⁸² accepted that after treatment and surgery (which incidentally, had been paid for by French social security and carried out in public hospitals) "le principe du respect dû à sa vie privée justifie que son état civil indique désormais le sexe dont elle a l'apparence; que le principe de l'indisponibilité de l'état des personnes ne fait pas obstacle à une telle modification." Therefore, it quashed two decisions of the Appeal Court of Aix-en-Provence and ordered the substitution of "female sex" for "male sex" in the applicants' birth certificates with all

¹⁸⁰(57/1990/248/319).

¹⁸¹1^o CASS. ASS. PLÉN. 11 Décembre 1992, *René X*. (1993) La Semaine Juridique, II Jurisprudence, p. 46.

¹⁸²1^o CASS. ASS. PLÉN. 11 Décembre 1992, *Marc X*. (1993) La Semaine Juridique, II Jurisprudence, p. 46.

the consequences this has in French law including family relationships.

A controversial area of application of Article 6 ECHR was that of disciplinary proceedings. The case *X... et autre c. Proc. gén. Bordeaux*¹⁸³ shows that the Court of Cassation let the Convention infiltrate this area too, as the appealed decision of the Bordeaux court (1st. chamber) was deemed erroneous on grounds of the ECHR. The new judgment of the civil chamber of the Court of Cassation was in line with the "new reading" of Article 55 of the Constitution, and gave treaties an authority superior to statutes, without any condition of reciprocity. In addition, Cassation said that the ECHR was not a mere declaration of intention:

Cassation, pour violation de ce texte [Article 6 (1) ECHR], de l'arrêt qui, pour refuser que les débats d'une instance disciplinaire dirigée contre les avocats aient lieu en audience publique, comme ceux-ci l'avaient demandée, après avoir énoncé, d'une façon erronée, que l'art. 55 de la Constitution ne confère aux conventions internationales conclues par l'État français une autorité supérieure à celle des lois internes que sous réserve pour chaque accord ou traité de son application par l'autre partie et que tel n'est pas le cas de la Convention européenne des droits de l'homme et des libertés fondamentales qui ne constitue qu'une déclaration d'intention à l'égard des États signataires [...]

In various other cases the Court limited itself to apply the appropriate article of the ECHR without further explanations. It simply resorted to the wording "méconnaît les prescriptions des art. 6, 1, et 6, 3, de la Convention des droits de l'homme la cour d'appel qui [...]"¹⁸⁴ or an equivalent expression, therefore making it difficult to see in the adjudication process the use made of the ECHR standards.

¹⁸³D.1991.Somm.295.

¹⁸⁴D.1992.IR.179.

The failure of the **Council of State** to recognise the pre-eminence of the Convention led to a number of petitions to Strasbourg being declared admissible even in the absence of the exhaustion of domestic remedies, since Article 8 ECHR was inoperative before national courts. On December 21, 1990, the Council of State decided the case *Confédération nationale des associations familiales catholiques et autres* regarding the distribution and administration of the abortion pill RU 486 by the Ministry of Health. The Council of State simply said that it was not in breach of French law or the ECHR, without any further justification.

Eu égard aux conditions ainsi posées par le législateur, les dispositions issues des lois des 17 janv. 1975 et 31 déc. 1979, relatives à l'interruption volontaire de la grossesse, prises dans leur ensemble, ne sont pas incompatibles avec les stipulations de la Convention européenne de sauvegarde des droits de l'homme et libertés fondamentales (art. 2-4)¹⁸⁵

A substantial infiltration of the Strasbourg *jurisprudence* can be observed, however, in the immigration case law. The influence of the European standards taken from *Abdulaziz, Cabales and Balkandali v. the United Kingdom*¹⁸⁶ and *Berrehab v. The Netherlands*¹⁸⁷ in the reversal by the Council of State of previous case law on Article 8 ECHR. As a consequence, Article 8 ECHR and the Strasbourg *jurisprudence* are taken into account whenever an alien files a petition for review of administrative decisions refusing visas or residence permits. In *Beldjoudi* (January 18, 1991) and *Belgacem and Babas* (both cases decided on April 19, 1991)¹⁸⁸ the Council of State drew on the right to respect for family life to review decisions ordering over-staying aliens to leave France.

¹⁸⁵D.1991.IR.33.

¹⁸⁶(1989) 11 EHRR 360.

¹⁸⁷(1989) 11 EHRR 322.

¹⁸⁸[1991] PL 458, 459.

In 1992 the Council of State passed judgment on an application for review of a refusal of the Ministry of the Interior to rescind a deportation order against *Minin*.¹⁸⁹ Minin's ECHR right to respect to family life was balanced against the threat he posed to public order and the outcome was a finding that the deportation order was not a disproportionate interference under Article 8 ECHR. Minin was born in France in 1938 from Italian parents but had refused to choose French nationality at 18. In 1972, he was ordered to leave the country after a three year prison sentence for theft, but he illegally returned and committed armed robbery. He was sentenced to prison again. While in prison, he married a Frenchwoman, with whom he later had a child. Minin asked the Ministry of the Interior to quash the 1972 deportation order on the basis of Article 8 ECHR and the status of his family at that time: his parents, brother, sister, wife and child all lived in France and were of French nationality:

En refusant d'abroger l'arrêt d'expulsion pris à l'encontre d'un étranger plusieurs fois condamné à des peines de prison, en se fondant sur le fait que l'intéressé, rentré clandestinement en France, a commis deux agressions à main armée pour lesquelles il a été de nouveau condamné à dix ans de réclusion criminelle, le ministre de l'intérieur, eu égard à la gravité de la menace que la présence de l'intéressé sur le territoire français fait peser sur l'ordre public, ne porte pas au droit de l'intéressé au respect de sa vie familiale une atteinte disproportionnée aux buts en vue desquels ce refus lui est opposé et ne méconnaît donc pas les stipulations de l'art. 8 de la Convention européenne des droits de l'homme[...]¹⁹⁰

To sum up, the case law suggests that the ECHR will probably extend its influence on further areas of French domestic law. If there is one constant element in all the cases reviewed it is the tenacity of the complainants and

¹⁸⁹Roger Errera, "Recent Decisions of the French Conseil d'Etat", [1992] PL 343.

¹⁹⁰D.1992.IR.148.

their lawyers to bring the ECHR to the attention of the domestic courts. This is whenever there is a question of rights and freedoms either directly protected by the Convention or tenuously connected with it, as judge Pettiti¹⁹¹ pointed out that for example the ECHR is a sort of universal panacea for French lawyers. Accordingly, the published case law in France shows the drastic increase in the number of judgments in which the ECHR is mentioned in the past few years. This has repercussions for another group of users of the Convention law and case law: those on the government side, for example, the *Ministère Public*, the reporting magistrates or the *Commissaires du gouvernement* in their reports to the Council of State. The tendency for them is, however, to resort to the ECHR as a reaction to their opponents' claims, because by far, it is (unsurprisingly) the individuals and their lawyers who take the initiative on pleading the ECHR. On the other hand, if what may be termed (for want of a better term) as a "complicity" between the national judiciaries and Strasbourg is encouraged by mutual confidence now that the Convention based rights can be fully claimed in domestic law, then there might be even more hope for a harmonised approach, particularly if such an approach is followed all over the member states.

¹⁹¹Louis-Edmond Pettiti, *ibid.*

(b) Italy

The statute of incorporation of the ECHR had two consequences in Italian law¹⁹²: with regard to the form, it gave the ECHR the force of a domestic statute, and with regard to the substance, it "transformed"¹⁹³ the Convention into an internal law.¹⁹⁴ The validity and effect of internationally recognised human rights principles are not "constitutional"¹⁹⁵ because these principles constitute sources of knowledge (a new *jus gentium*) about the significance to be attached to fundamental rights but without any special legal force (*forza di resistenza*) vis-a-vis the rest of the statutes in the domestic hierarchy of norms.

The position of the ECHR in Italian law is weak, however, as both the Constitutional Court and the Court of Cassation treat it as ordinary law, on which it is not possible to base claims to annul domestic legislation enacted after its ratification. International law on treatment of aliens and EU law are both exempted from such weakness. In contrast, the (new) French approach to grant all international instruments validity superior to parliamentary laws (and not by way of granting exceptions or making the ECHR's status follow the status of EU law) gave the incorporated ECHR a firm position vis-a-vis domestic laws.

¹⁹²The Convention was signed by Italy on November 4, 1950, and the First Protocol on March 20, 1952. The ECHR was incorporated into the Italian legal system on August 4, 1955, when Parliament passed Law No. 848 with the text of the Convention annexed to it. A general bibliography on the ECHR in Italy is the following: Sabina Mazzi, "Bibliografia italiana sulla convenzione europea dei diritti dell'uomo", in (1986) 22 *Rivista di Diritto Internazionale Privato e Processuale* 291.

¹⁹³Article 1 of the Law No. 848 authorised ratification, which took place on October 26, 1955, and Article 2 ordered its execution into domestic law.

¹⁹⁴A. Z. Drzemczewski, European Human Rights Convention in Domestic Law: A Comparative Study, 146, and Capotorti, in A. H. Robertson (ed.), id., 42.

¹⁹⁵A. H. Robertson (ed.), id., 117 - 118.

For the **Italian Constitutional Court** Article 10 (1) of the Constitution is aimed at the automatic conformity of the national legal system to customary international law and not to international treaties.¹⁹⁶ Besides, constitutional control in Italy, unlike France, is always incidental, i.e. the question must be referred to the Constitutional Court in the process of proceedings already being heard by another court.¹⁹⁷

In 1960, in *Regione Trentino-Alto Adige c. Presidente del Consiglio dei ministri*, the Constitutional Court stated what was the position of international treaties in Italian law by arguing that Article 10 (1) of the Constitution covers "generally recognised norms of international law" but not "specific pledges undertaken by the State on the international level" (that is, treaties)¹⁹⁸. A domestic statute would not be declared unconstitutional for the sole reason that it is against an international treaty.¹⁹⁹ Nonetheless, questions of Convention-based unconstitutionality could be raised concerning treaties on the treatment of aliens, although the authority for doing so comes from Article 10 (2) of the Constitution. Judgment n. 120 of 1967 spelled out the conclusion that "the principle of equality also applies to aliens where respect of these fundamental rights is concerned." The Court reasoned as follows:

[Article 3 should be applied] in conjunction with Article 2 and Article 10 paragraph 2, of the Italian Constitution, the first of which recognises for all, Italian nationals and aliens alike, the inviolable

¹⁹⁶Enzo Cannizzaro, "Trattato (adattamento al)" in: Enciclopedia del diritto, (1992), vol. XLIV, 1414. Also relevant for this stage are V. Vigoriti, "Italy: The Constitutional Court" (1972) 20 AJCL 404; G. Bognetti, "The Political Role of the Italian Constitutional Court" (1974) 49 Notre Dame Law Review 981; A. Pergola and Del Duca, "Community Law, International Law and the Italian Constitution" (1985) 79 AJIL 598, and Giovanna Michele Palmieri, "L'esperienza italiana in tema di ricorsi individuali alla commissione europea dei diritti dell'uomo", (1980) 63 Rivista di Diritto Internazionale 45.

¹⁹⁷Alessandro Pizzorusso, "Giurisdizione costituzionale e diritti fondamentali", (1981) 36 Rivista di diritto processuale 340, 341.

¹⁹⁸Decision n. 32 of 1960, (1980-1981) 5 The Italian Yearbook of Int'l Law 251, 252.

¹⁹⁹G. Gaja, "Italy" (chapter 5) F. G. Jacobs and S. Roberts (ed.), id.

human rights, while the other lays down that the legal status of foreigners is regulated by law in conformity with international rules and treaties.²⁰⁰

Incidentally, an example of a lower court applying the constitution based exception to the "traditional" position on the validity of international law could be the case *Perovic*, where a Rome Court of Appeal found that, owing to the special protection afforded by Article 10 (2) of the Constitution, "the rules of the ECHR in regard to the foreigner enjoy '*forza di resistenza*'".²⁰¹ For that reason, the court could resort to Article 6 ECHR to override a municipal law requirement of using the Italian language in all legal proceedings, with the sole exception of the languages of ethnic minorities in some regions of the country. The Convention was mentioned in support of the decision to serve legal documents to foreign defendants in a language which they understood, although this exception did not extend to all the steps in the prosecution of the action.

Yet this reasoning could not be taken further in order to cover the whole of the ECHR in all situations because it is dependent on the exception made by Article 10 (2) of the Constitution, as it was made clear in the Constitutional Court judgment n. 188 of 1980, *re Lintrami and others*.²⁰² The case concerned the constitutionality of the requirement set down in Articles 125 and 128 of the Code of Criminal Procedure regarding the appointment of a defence attorney even if a defendants insists on carrying

²⁰⁰English version from: A. H. Robertson, Privacy and Human Rights, 118.

²⁰¹(1980) 23 *Rivista italiana di diritto e procedura penale* 953, 956.

²⁰²At a hearing before the Turin *Pretore* (first instance court competent to deal with cases where the penalty imposed may be imprisonment of up to 4 years, a fine or both) the defendant Mr. Arialdo Lintrami put forth in the following terms that he did not wish not carry out his own defence nor have a defence attorney to carry it out for him: "I will not defend myself because there is nothing to defend myself from and I do not recognise the Italian courts of justice or the judge or whomever could accuse and sentence me. I disallow any previous appointment I had made and invite the court appointed lawyer that will be assigned to me not to defend me because I do not wish to be defended", (1980) 25 *Giurisprudenza costituzionale* 1612, 1615.

out his or her own defence. The thinking that human rights treaties do not normally come under the special category of Article 10 (2) of the Constitution is illustrated by the Constitutional Court's dismissal of the case: "The Court cannot but reassert its settled *jurisprudence* which rules out international treaty provisions, even if general, from the scope of Art. 10 of the Constitution."²⁰³ The Court added that:

[...] -in the absence of a specific constitutional provision- treaty provisions implemented in Italy have the same force as ordinary statutes. Therefore, the very possibility of raising, under this aspect, a question of constitutionality is barred, even more when [...] treaty provisions are invoked as such as tests for the constitutionality of statutory provisions²⁰⁴

The *dottrina* (scholarly writings) protested against this approach and unsuccessfully argued in favour of giving the ECHR constitutional standing based on the interplay of Articles 2, 10 and 11 of the Constitution. Here it becomes necessary to look at the Constitution again.²⁰⁵ The two first paragraphs of Article 10 are as follows: "(1) Italy's legal system conforms with the generally recognised principles of international law" (where the principle '*pacta sunt servanda*' is apparently given effect in domestic law); and "(2) The legal status of foreigners is regulated by law in conformity with international rules and treaties." Other writers suggested the constitutionalisation by the operation of the "general clause" of Article 2 which states that Italy recognises and guarantees the inviolable rights of man.²⁰⁶ Some took the matter further and proposed the constitutionalisation

²⁰³(1980) 25 *Giurisprudenza costituzionale* 1612, 1627.

²⁰⁴(1980) 25 *Giurisprudenza costituzionale* 1612, 1626.

²⁰⁵The English translations of the articles of the Italian Constitution are from: Blaustein, A. B. & Flanz, G. H. (ed.) *Constitutions of the Countries of the World*, vol. 8.

²⁰⁶Article 2 of the Constitution lays down that: "The Republic recognises and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which his personality finds expression, and imposes the performance of unalterable duties of a political, economic and social nature."

of the ECHR such as the Constitutional Court had already done with EU law,²⁰⁷ which enjoys supremacy due to the application of the principle "*lex posterior generalis non derogat priori specialis*" instead of the usual "*lex posterior derogat priori*"²⁰⁸ as decided in the case n. 183 of 1973, *Frontini c. Ministero delle Finanze*.²⁰⁹ In *Frontini* the Constitutional Court conceded that Article 11 of the Constitution²¹⁰, which had been written to favour Italy's admission to the United Nations and to other organisations for the promotion of "peace and justice"²¹¹ implied that the constitutional law-givers were "[...] inspired by programmatic principles of a general value, which were concretely realised in the European Community and other European regional organisations." Moreover, Article 11 was resorted to again to define EU law as an "independent and separate legal system" in *S.p.a. Granital c. Amministrazione delle Finanze*²¹² in 1984. In *Lintrami*, the Constitutional Court rejected the views that the ECHR could be granted the same treatment as EU law via Article 11: "[...] Art. 11 of the Constitution cannot even be taken into account, as one cannot single out any limitation to national sovereignty with regard to the

²⁰⁷G. Gaja, "Italy" (chapter 5) in: F. G. Jacobs and S. Roberts (ed.), The Effect of Treaties in Domestic Law, 87.

²⁰⁸Alfonso Celotto, "La prevalenza del diritto comunitario sul diritto interno: orientamenti della Corte Costituzionale e spunti di teoria generale", (1992) 37 *Giurisprudenza costituzionale* 4481, 4488. See, also: G. Alpa, L'influenza del diritto europeo sul diritto italiano, (1982).

²⁰⁹(1974) 2 CMLR 381.

²¹⁰Francesco Francioni, "Italy and the EC: the legal protection of fundamental rights", in: Francesco Francioni (ed.), Italy and EC Membership Evaluated, (1992), 195.

²¹¹Article 11 of the Constitution lays down that: "Italy condemns war as an instrument of aggression against the liberties of other peoples and as a means for settling international controversies; it agrees, on conditions of equality with other states, to such limitation of sovereignty as may be necessary for a system calculated to ensure peace and justice between nations; it promotes and encourages international organisations having such ends in view."

²¹²Decision n. 170 of 1984, (1984) 1 *Giur. It.* 1521. The Constitutional Court intended to reach the same conclusion previously adopted by the ECJ, namely that ordinary courts should apply those EU provisions with direct effect irrespective of conflicting national legislation. Contrary to the ECJ's approach, however, the application of EU law was made dependent on rules already existing in Italian law, that is the combination of Article 11 of the Constitution and the statute implementing the Treaty of Rome.

specific treaty provisions in question."²¹³ It does not seem unreasonable, then, to share the scepticism of those Italian scholars who did not foresee a quick evolution of the constitutional case law towards granting primacy to Strasbourg law.²¹⁴

The cases thereafter consistently reaffirmed this position. In a judgment concerning an accused person's right to defend himself, the Constitutional Court mentions two decisions of the European Commission on Article 6 (3,c) ECHR, which were not used, however, to depart from a solution offered by municipal law and the Constitutional Court rejected the question of Convention-based constitutionality.²¹⁵ Moreover, in judgment n. 17 of 1981 the Constitutional Court did not find the ECHR helpful to define rights granted by the Constitution and the decision was based entirely on municipal law:

One cannot assume that on the basis of a provision such as the one contained in the European Convention on Human Rights, implemented in Italy through an ordinary statute, the balance of the interests in question should be reserved by the Constitution to the courts, with the consequence the the legislator could have no discretion in arranging for certain proceedings to be conducted in camera.²¹⁶

A further criticism is that when the constitutionality of Law n. 15 of February 6, 1980 (concerning exceptional measures to protect the democratic order and public security against terrorism), was challenged in the course of proceedings against the criminal defendant Mr. Giuliano Naria, the Constitutional Court missed the opportunity to make a pronouncement on whether the rules extending the period of pre-trial detention by a third were in line with

²¹³(1980) 25 *Giurisprudenza costituzionale* 1612, 1627.

²¹⁴Guido Raimondi, "La convenzione europea dei diritti dell'uomo nella gerarchia delle fonti dell'ordinamento italiano. Nota minima in margine alla sentenza Ciulla", (1990) 3 *Rivista internazionale dei diritti dell'uomo* 36, 39.

²¹⁵(1980-1981) 5 *The Italian Yearbook of International Law* 251, 254.

²¹⁶(1980-1981) 5 *The Italian Yearbook of International Law* 251, 256-257.

the ECHR. Mr. Naria had been held for 4 years in pre-trial detention. The judgment of February 1, 1982, reaffirmed that the ECHR had the force of an ordinary statute, held that (unsurprisingly) Art. 5 (3) ECHR - a non self-executing article - did not provide clear criteria as such for assessing the reasonable length of pre-trial detention and concluded that therefore that the domestic statute was not unreasonable. Unfortunately the extensive Strasbourg case law on the issue of Article 5 ECHR was not resorted to. The argument echoes the civilian's concern with the status of a rule in the domestic hierarchy of norms: "[the ECHR] on one hand, does not place itself at the constitutional level, and on the other, it does not contain substantial criteria for want of specificity".²¹⁷

The matter was again considered in the case n. 315 of July 5, 1990. On this occasion, the Constitutional Court issued the usual denial of the constitutional status of the ECHR and dismissed a claim of unconstitutionality of Articles 1 and 2 of the law of January 23, 1989 n. 22²¹⁸ made with reference to Articles 3 and 24 of the Constitution and Article 6 ECHR. The domestic statute required lawyers to have a specific authorisation from their clients (criminal defendants in contempt) so as to challenge a sentence passed by default. The Court confirmed previous *jurisprudence*:

Whereas the regretted non-compliance with Article 6 (3,c) of the European Convention on Human Rights - even if we put aside the often quoted teaching that a treaty provision "does not place itself at the constitutional level" [...] the aforementioned reasons as regards the right of defence therefore lead us to reject the claim that Article 2 of the law 23.1.1989 n. 22, which substitutes Article 192 (3) of the Code

²¹⁷(1982) 27 *Giurisprudenza costituzionale* 85, 100.

²¹⁸These articles superseded Articles 183 (*bis*) and 192 (3) of the Code of Criminal Procedure of 1930.

of Criminal Procedure 1930, is not in conformity with the treaty provision.²¹⁹

Therefore, the pattern is as follows: if the decision concerns the treatment of aliens, the Court seems willing to give the ECHR overriding effect but such result comes from the Italian Constitution with its alien protection clause and not from the ECHR itself. In all other cases, the Court does not "constitutionalise" the ECHR, and treats it as an ordinary statute.

Likewise, the **Italian Court of Cassation** does not give the ECHR any constitutional status.²²⁰ Notwithstanding the formal assertion that the ECHR is directly applicable in Italian domestic law, Cassation's position has always been that the rules of the ECHR are programmatic, intended for the guidance of the legislature and mandatory only between the member states. Furthermore, the rulings of the European Court of Human Rights are deemed to lack domestic coercive force.²²¹ For example, in the decision n. 3295 of June 3, 1985,²²² the Court of Cassation rejected a petition for review on grounds that the administrative courts where the application for review was filed lacked jurisdiction to hear the case.²²³ The appellant sought a declaration of "unconstitutionality" by reference to Article 6 (1) ECHR of several of the prohibitions which were embodied in the Italian Constitution so as to ensure that the existence of the republican system of government *per se* was not challengeable. The application was dismissed because in the Court's view Article 6 (1) ECHR "does not make any reference to the possibility of putting into question a

²¹⁹(1990) 35 *Giurisprudenza costituzionale* 2017, 2024.

²²⁰The case law shows remarkably little influence from the Convention, in spite of the number of Italian criminal cases dealing with Arts. 5 and 6 ECHR that are heard in Strasbourg.

²²¹Jörg Polaciewicz and Valérie Jacob-Foltzer, The European Human Rights Convention in domestic law: The Impact of the Strasbourg case-law in States where direct effect is given to the Convention, (1991) 12 *HRLJ* 65, 39.

²²²(1986) 28 *YECHR* 317.

²²³The Court of Cassation has the final word on issues of jurisdiction between the administrative and ordinary courts.

law of the state or the provisions of the Constitution", although it recognised that:

Article 6, paragraph 1 of the European Convention on Human Rights when it lays down everyone's right to a fair and public hearing by an independent and impartial tribunal established by law obliges every state party to the Convention to grant the people within its jurisdiction access to a court of law of such characteristics.

Even if taken into account, another aspect which shows the Convention's weakness is that judges do not consider it as *leges perfectae*²²⁴ i.e capable of supporting a decision on its own. As the Court of Cassation put it in the case of January 25, 1986, "If the programmatic norms [of a treaty] are not respected, they can only give rise to a lawsuit before an international organisation"²²⁵ and then deployed its traditional stance as follows,

The accused cannot maintain that a rule of the Italian legal system is against the norms of the Constitution because it conflicts with the European Convention on Human Rights. The law that ratified the Convention gives it the value of an ordinary law [...] The Constitution is the fundamental law of the State and it cannot be modified by an international convention.²²⁶

Although in *re Castro*²²⁷ the Court of Cassation rejected a leave to appeal because it was filed late, some interesting considerations concerning the ECHR were, in terms of the common law system, stated *obiter*. At the request of the Italian Ministry of Justice, the Public Prosecutor with the Florence Court of Appeal issued a warrant of arrest against a Mr. Castro on August 3, 1988. The defendant was already under arrest for fraud in

²²⁴Mario Chiavario, "La convenzione europea dei diritti dell'uomo ed il suo contributo al rinnovamento del processo penale italiano", (1974) 57 *Rivista di Diritto Internazionale* 454, 464.

²²⁵(1986) 29 *YECHR* 305.

²²⁶(1986) 29 *YECHR* 305.

²²⁷(1990) 73 *Rivista di diritto internazionale* 1037.

Geneva. On August 12, 1988, he was served this Italian arrest warrant while in prison. He later challenged it arguing that in the 1983 case *Angelopoulos* the Court of Cassation had admitted appeals against arrest warrants issued by Public Prosecutors in extradition cases. The defendant argued that any other pronouncement by the court would be incompatible with Article 5 (4) ECHR. The finding of the Criminal Division of the Court of Cassation on May 8, 1989, explained that only self-executing rules of the ECHR enjoy immediate operation in Italy, as follows: "if an international rule is like a complete domestic statute, with its essential elements, that is, if the act is able to create rights and duties without any other act, the domestic adoption of the international rule is automatic [...]"²²⁸ Article 5 (4) ECHR is not self-executing, and for that reason, the Court said, it was made operative in Italy by means of various domestic provisions, among them, some prescriptions laid out in the Code of Criminal Procedure. Those provisions grant a right to challenge arrest warrants in extradition cases (such as the one issued against the applicant) before the Court of Cassation. Unfortunately for the applicant, however, there are also time limits and since the challenge was made *ex-tempore*, the Court did not grant leave to appeal.

There are no differences of opinion between the Constitutional Court and the Court of Cassation on the authority of the ECHR. For example, in the 1992 case *Di Bella c. Consiglio dell'ordine dei giornalisti*²²⁹ the applicant invoked Article 6 ECHR in his challenge of constitutionality. The Court of Cassation declined to "constitutionalise" the Convention in the reference it made to the Constitutional Court. The case concerned the challenge of the constitutionality of the closed hearings

²²⁸(1990) 73 *Rivista di diritto internazionale* 1037, 1043.

²²⁹(1993) 43 *Giustizia Civile* 706, 708.

which had taken place before a Milan first instance court and then, Court of Appeal, in an action against a disciplinary decision of the Council of the Order of Journalists. The constitutional question which in the end was submitted to the Constitutional Council was whether Article 64 of Law n. 69 was compatible with Article 101 (1) of the Italian Constitution. For the Court of Cassation, the Convention simply does not enjoy a sufficiently high rank in the domestic hierarchy of norms, therefore, the Italian Parliament is theoretically free to pass laws in conflict with it. The resistance of the Italian legal system to let the parties to a case plead the unconstitutionality by reference to the ECHR is based on the fact that the authority of the ECHR derives from the legislative act of incorporation (order of execution) and not from the ECHR as such. The principle *lex posterior* [...] denies the incorporated Convention a position of complete firmness against opposing subsequent domestic legislation.

The "traditional" position is the one applied also in, for example, disciplinary cases. In a case of July 5, 1985 the Disciplinary Chamber of Council of the Judiciary held that the requirement of publicity of the proceedings in Article 6 (1) ECHR was applicable in disciplinary cases against magistrates. The ECHR was resorted to in order to strike a balance between on the one hand, the protection of the rights of the magistrate as a citizen and holder of an office which enjoys independence versus, on the other, the general interest in the *buon andamento* (to be organised in a way that ensures proper functioning) of the judicial system. The Court chose publicity, as follows:

Within the framework of these fundamental principles [mentioned above] the court holds that the rule laid out in article 34 (2) of Law 31.5.1946 n. 511 which requires the debate on the attribution of responsibility be held behind closed doors has been tacitly set aside by Law 4.8.1955 n. 848. This belief

is based on the resolution of some interpretative questions which, as said, are contained within those constitutional principles that rule judicial discipline.²³⁰

The tribunal declared that the domestic law requirement of a hearing behind closed doors had been made void by the ECHR and ruled that "the statutes of adaptation of an international treaty have the same strength of ordinary laws, therefore, they enjoy 'repeal force' of the laws already in existence that do not conform to them."²³¹ This approach was scarcely satisfactory for A. Pizzorusso²³² who wrote that the court achieved its objective (the application of the ECHR) the "easy way", i.e. without departing from the "traditional" principle *lex posterior derogat priori*. The court, as most courts would have probably done in the circumstances, neatly sidestepped the (wider) concerns of the *dottrina*, and said that "to decide this case it is not necessary to dwell on the matter of the 'constitutionalisation' of the norms of the Convention" and thus avoided a discussion on whether the ECHR could be used as an interpretative device of laws passed after Law 4.8.1955 n. 848 or of constitutional rank.

While it is to be conceded that normally the ECHR is not pleaded before the administrative courts or rather, that as soon as an issue is considered to affect *subjective rights*²³³ it will then be heard by the ordinary courts,²³⁴

²³⁰Foro It., 1986, III, 43, 48.

²³¹Foro It., 1986, III, 43, 47.

²³²Notes to the decision, Foro It., 1986, III, 43, 45.

²³³This exclusion of "legitimate interests" can be explained only by making a reference to a distinction typical of the Italian legal system, which is the opposition between subjective rights (*diritti soggettivi*) and legitimate interests (*interessi legittimi*). In cases of violations of subjective rights the ordinary courts (and the Court of Cassation) are competent. Under Article 113 of the Italian Constitution when there is a legitimate interest of a person complaining of a rule made in the public interest, the administrative courts (and the Council of State) are competent. It is often difficult, however, to determine whether a legal relationship involves a "right" or a "legitimate interest". Since administrative law is not codified, it is one area of Italian law in which precedent plays an important role. Case law is decisive to distinguish rights from legitimate interests. Italian lawyers have developed a body of

the expansive pressures of the ECHR on the Italian legal system can nevertheless be observed in the following example, *Sheldia c. Ministero Interno*²³⁵ before an administrative regional tribunal (T.A.R.) in the region of Friuli Venezia Giulia. The case concerned a petition of political asylum by a citizen of Albania. Among the various international rules which, in typical civilian style, the court found that "applied" to the situation, the T.A.R. considered that "it is particularly relevant the ECHR of November 4, 1950 (with its Protocols) which protects the fundamental rights of individuals regardless of citizenship."²³⁶ The petition was, however, rejected on the consideration that from the questioning of Ms. Sheldia it did not appear to the court that she had suffered any specific persecution nor that she would on her return to Albania:

From the transcript [of the interrogatory] it does not appear, moreover, that the applicant had suffered any specific persecution and, therefore, the grounds for denial of the application, put briefly, appear to be sufficiently well founded. Not even in her story does she put forward any reason that may lead us to presume a possible persecution as her comments only reflected the unfortunate current situation in Albania.²³⁷

All in all, the weak position of the ECHR in the domestic rank of norms places important limits to its "infiltration" although the presence of Convention law is becoming more and more noticeable within the Italian legal system.

precedents of what is and what is not to be considered one or the other of these notions. In a sense, the Council of State and the administrative courts are not fully independent, because when the case law does not provide an answer to the choice of court, the Court of Cassation has the final word in issues of jurisdiction. See: M. Cappelletti et al. The Italian Legal System: An Introduction, (1967), 116.

²³⁴A. Z. Drzemczewski, id., 150.

²³⁵Foro amministrativo, 1992, at 2021.

²³⁶Foro amministrativo, 1992, at 2021, 2023.

²³⁷Foro amministrativo, 1992, at 2021, 2025.

(c) United Kingdom

The ECHR is not part of United Kingdom law²³⁸ and, like any other international treaty, requires to be incorporated by a deliberate act of Parliament. The local conditions that obtain concerning human rights law have two salient features: one is that liberty is residual and the other, that only if the courts or another governmental institution will afford a remedy is there a right. This common law approach reveals a "logic" which is the exact opposite of the one purported by the substantive law of the ECHR where rights are laid out in writing: the ECHR "is just the sort of Continental charter that was despised by Dicey."²³⁹ In the absence of substantive rights, the common law deals with problems only when they arise, so people are free as long as they do not breach the law or invade the persons or property of others. In this context of no bill of rights, freedom is considered "residual" because it is what is left after considering the right of others, the limits established and legal provisions.²⁴⁰

The local legal systems, as was the case in the two countries already studied, will influence the operation of a "transplanted" ECHR (either incorporated or not²⁴¹) with the scope of existing rules and exceptions, remedies,

²³⁸The United Kingdom was the first country to ratify the ECHR and recognise the right of individual petition of Article 25 of the Convention and the optional competency of the Court established in Article 47. It ratified the First Protocol, but not the Fourth and the Sixth Protocols.

²³⁹K. D. Ewing and C. A. Gearty, Freedom Under Thatcher: Civil Liberties in Modern Britain, (1990), 14.

²⁴⁰Claire Palley, The United Kingdom and Human Rights, (1992), 111-2.

²⁴¹As regards the debate over a Bill of Rights for the United Kingdom, various proposals have been examined by the British government and Parliament particularly since the 1970s. In 1977, for example, the Standing Advisory Commission on Human Rights in Northern Ireland recommended the creation of a Bill of Rights for the United Kingdom to advance the protection of rights in Northern Ireland (Cmd 7009, 1977). In 1978, a select committee of the House of Lords was not agreed on the desirability of a Bill of Rights, however, if one was to be created, it should be a Bill to incorporate the ECHR in domestic law (HL 176 (1977-78)). Later, the House of Lords approved a Bill to incorporate the ECHR: HL Bill 54 (1980-81) which failed in the House of Commons. (And other Bills in both Houses have also been introduced.) In addition, in the 1980s, Charter 88 and the Institute for Public Policy Research also put forward proposals for a Bill of Rights largely based on the ECHR.

classifications, methods and so on. P. S. Atiyah²⁴² highlighted some (potential) consequences of the introduction of a "full-blown" British Bill of Rights, that could

[...] bear upon methods of judicial selection, the styles of legislative drafting, and a complete reappraisal of the relative values of certainty and justice in the individual case. It could even raise conflicts of ultimate values - such as are involved in the clash between utilitarian and rights-based theories - and, even more difficult perhaps for the English lawyer to swallow it, it could leave the resolution of such ultimate conflicts to the judges from time to time, rather than to some legislative directive. All these possible changes could bring with them further significant changes whose outcome is likely to be unforeseeable at the outset. For instance, alterations in the mode of judicial selection may need to be quite dramatic to cope with a British Bill of Rights. It may be necessary to open the door to much more politically minded lawyers, and to break up the cosy homogeneity of the present English bench. This in turn may lead to fundamental alterations in the role of the bar, and its whole professional *raison d'être* as an independent profession may come under question as judges are drawn from the ranks of other lawyers.

Even if the ECHR in its present position does not produce all these effects²⁴³, there is nevertheless infiltration to municipal law because "in a reluctant, informal way, not only the relevance of the Convention but its *superiority* is conceded."²⁴⁴ As Professor C. Munro pointed out: "The law relating to civil liberties in the 1990s could not be summed up as 'judge-made'. Its sources are more diverse, and the shape of the law is conditioned by the superimposed E.C.H.R."²⁴⁵ There is a paradox lying behind

²⁴²P. S. Atiyah and Robert S. Summers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions, (1991), 427.

²⁴³Ronald Dworkin, in A Bill of Rights for Britain, 1, wrote of a decline in the "culture of liberty" (the community's shared sense of the importance of freedom and its protection) as one of the reasons why formal legal protection of freedoms is lower in the United Kingdom than in other European countries.

²⁴⁴Ferdinand Mount, The British Constitution Now: Recovery or Decline?, (1992), 231.

²⁴⁵Colin R. Munro, "The British Constitution in the 1990s", (1994) 31 *Coexistence* 159, 171.

such impact: although there are no formal limits to the validity of Parliamentary legislation, the Convention, which has not been incorporated, is nevertheless able to keep domestic legislation under check.²⁴⁶ It has been suggested that Article 25 ECHR creates a situation similar to incorporation.²⁴⁷

(c.1) English law

England is a dualist country as regards international law. Municipal legislation should be interpreted as far as possible to be in conformity with the ECHR, unless to do so would be contrary to the intention of Parliament.

Parliament does not intend to infringe international law²⁴⁸: in *Salomon v Commissioners of Customs and Excise*²⁴⁹ Lord Diplock explained that "we can refer to the convention [on the Valuation of Goods for Customs Purposes of 1950] to resolve ambiguities or obscurities of language in the section of, and the schedule to, the statute." A similar approach can be observed in *Post Office v Estuary Radio, Ltd.*²⁵⁰

As regards the ECHR, in the 1975 case *R v Secretary of State for Home Affairs, ex p. Bhajan Singh*²⁵¹ Lord Denning said that it should be used as an interpretative instrument:

The Court can and should take the Convention into account. They should take it into account whenever

²⁴⁶A. Drzemczewski, "European Human Rights Law and the United Kingdom", (1976) 92 LQR33, 36.

²⁴⁷Sir Humphrey Waldock, "The Effectiveness of the System set up by the European Convention on Human Rights", (1980) 1 HRLJ 1, 11.

²⁴⁸R Higgins, *United Kingdom*, id., 135.

²⁴⁹[1966] 3 All ER 871, 876.

²⁵⁰[1967] 3 All ER 663, 682. See also *National Smokeless Fuels Ltd. v. Inland Revenue Cmr.* [1986] STC 300

²⁵¹[1975] 2 All ER 1081 or [1975] 3 W L R 225.

interpreting a statute which affects the rights and liberties of the individual. It is to be assumed that the Crown, in taking its part in legislation, would do nothing which was in conflict with treaties. So the court should now construe the Immigration Act 1971 so as to be in conformity with a Convention and not against it.

Of his decision in *Birdi v Secretary of State for Home Affairs*²⁵², Lord Denning took some of his previous statements back and said, "I would like to correct one sentence in my judgment in Birdi's case. I said: 'If [an Act of Parliament] did not conform [to the convention] I might be inclined to hold it invalid.' That was a very tentative statement, but it went too far."²⁵³ Lord Denning held the same position in 1976, when said in *R v Chief Immigration Officer, Heathrow Airport and another, ex parte Salamat Bibi*²⁵⁴ that "if there is an ambiguity in our statutes or uncertainty in our law, then these courts can look at the convention as an aid to clear up the ambiguity and uncertainty", however, he expressed that "I would dispute altogether that the convention is part of our law."

In the early 1980s, Lord Scarman found the ECHR relevant as an aid to statutory interpretation in some cases: *R v Secretary of State for Home Affairs, ex p. Phansopkar*²⁵⁵ and in *Ahmad v Inner London Education Authority*²⁵⁶. In the latter, Lord Denning said that although the ECHR "is not part of our English law [...] we will always have regard to it." He found fault with the style of drafting of the ECHR, no doubt because it was unfamiliar from a common lawyer's perspective: "But it is drawn in such vague terms that it can be used for all sorts of unreasonable claims and provoke all sorts of litigation."

²⁵²[1975] 2 All ER 1081.

²⁵³[1975] 2 All ER 1081, 1083.

²⁵⁴[1976] 3 All ER 843, 847.

²⁵⁵[1975] 2 All ER 497, 510.

²⁵⁶[1978] 1 All ER 574.

Ackner L J said in *Fernandes v Secretary of State for the Home Department*²⁵⁷ that although the ECHR was "not part of the law of this country" it "may be resorted to in order to help to resolve some uncertainty or ambiguity in municipal law." The same approach was that of Webster J in the 1984 case *R v Secretary of State for the Home Department, ex parte McAvoy*.²⁵⁸

As regards the 1990s, let us begin with *Brind and others v Secretary of State for the Home Department*²⁵⁹ where there is an important limitation on the application of the ECHR as regards delegated legislation. The House of Lords "rejected this approach: the presumption that legislation complies with treaty obligations does not apply so as to limit the meaning of clear general words, but can be applied only when there is a real ambiguity, i.e. where the words are capable of bearing more than one meaning."²⁶⁰ It was not for the judges to allow the ECHR take further root "by the back door". The issue discussed in this case was whether the Home Secretary acted ultra vires when he directed the IBA and BBC to stop broadcasting direct statements by representatives of proscribed organisations in Northern Ireland. The House of Lords gave a negative answer and dismissed the appeal.

Under the Broadcasting Act 1981, in respect of the IBA, and the licence and agreement of operation, as regards the BBC, the Home Secretary could require these two broadcasters "to refrain from broadcasting any matter or classes of matter specified in the notice." The appellants, journalists, applied for judicial review of the Home Secretary's decision on grounds that his direc-

²⁵⁷[1981] Imm A R 1 (CA).

²⁵⁸[1984] 3 All ER 417, 421 (QBD).

²⁵⁹[1991] 1 All ER 720.

²⁶⁰Lord Browne-Wilkinson, "The Infiltration of a Bill of Rights", [1992] PL 397, 404.

tives were ultra vires and in dissonance with the duty to preserve due impartiality imposed on the IBA and BBC, and in addition, that he acted in breach of Article 10 ECHR, without necessity, disproportionately and perversely. Since the ECHR was not part of English domestic law and there was no presumption that an administrative discretion had to be exercised in conformity with it. The exercise of such a discretion could only be reviewed by the courts in accordance with the domestic principles of judicial review, since the continental test of proportionality had not been "borrowed" by English law.

Although Lord Templeman concurred in dismissing the appeal he did not rely on the domestic principles of *Wednesbury* reasonableness to reach his conclusion "[...] The subject matter and date of the *Wednesbury* principles cannot in my opinion make it either necessary or appropriate for the courts to judge the validity of an interference with human rights by asking themselves whether the Home Secretary has acted irrationally or perversely."²⁶¹ The domestic court should ask:

whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable. In terms of the Convention, as construed by the European Court of Human Rights, the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent²⁶²

The ECHR exercises pressures to transplant legal notions "borrowed" from other legal systems. Sophie Boyron²⁶³ observes that the opinion of Lord Ackner shows a concern towards doing away with one of the main organising principles in English law, the distinction between appeal and

²⁶¹[1991] 1 All ER 720, 726.

²⁶²[1991] 1 All ER 720, 726.

²⁶³Sophie Boyron, "Proportionality in English Administrative Law: A Faulty Translation?", (1992) 12 Oxford Journal of Legal Studies 237, 262.

review. An acceptance of the civilian principle of proportionality would make English judges apply the test of whether the interference complained of corresponds to a pressing social need. Proportionality would involve a judgment on the merits, which is the function of appeal. Unlike French administrative judges, English judges do not have the power of appeal in administrative law.

In *R v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury*²⁶⁴ the applicant sought summonses alleging blasphemous libel concerning Allah (Almighty God) against the author and publishers of "The Satanic Verses." The petitioner sought judicial review of the magistrate's decision refusing to extend the common law offence of blasphemy outside the Christian faith. The application was dismissed. On appeal it was held that the freedom of religion protected by arts. 9, 10 and 14 ECHR did not require the extension of the law of blasphemy to the protection of Islam. Next, the Appeal Committee of the House of Lords dismissed an application for leave to appeal.

Although in this case domestic law (the English common law on blasphemy) was unambiguous and thus, it was not necessary to resort to the ECHR to clear up any obscurity, Watkins L J said that:

nevertheless, he [Mr. Lester, Q.C., who was counsel for Viking Penguin Publishing Co. Ltd.] thought it necessary, and we agree, in the context of this case, to attempt to satisfy us that the United Kingdom is not in any event in breach of the Convention. Indeed, he went further and asserted that if this application were to succeed and result in successful prosecutions, the rights of Mr. Rushdie and of Viking Penguin, as protected by Articles 7 and 10 of the Convention, would be violated.²⁶⁵

²⁶⁴[1991] 1 QB 429.

²⁶⁵[1991] 1 QB 429, 449.

This brings us to the question of the extent of the expansion of the non-incorporated ECHR in English law. One issue is whether the ECHR can be used as an aid to interpretation in non-statutory English law. The answer in the affirmative is easier to give after *Derbyshire C C v Times Newspapers Ltd and others*.²⁶⁶ In this case the local authority filed an action against the publishers, editor and two journalists of the newspaper claiming damages for printing articles alleging to reveal improprieties in the authority's investment and control of its superannuation fund. The Court of Appeal reversed the first instance determination. The Court held that although individuals within the authority could sue for malicious falsehood or criminal libel, it would stamp out legitimate criticism and impose additional restrictions on the freedom of expression if a local authority were to have the right to sue for libel in respect of its governing and administrative reputation when there is no allegation of financial loss. The lower court was wrong to conclude that it could not resort to the ECHR to resolve an ambiguity in the common law. Balcombe L J said:

I do not agree with his finding [the finding of the lower court judge] that there was no uncertainty in English law on this point. He was faced with two conflicting decisions: one (*Manchester Corp v Williams*) of a Divisional Court which was *prima facie* binding upon him unless he could find a valid ground on which to distinguish it and one (the *Bognor Regis* case) by a judge of co-ordinate jurisdiction. There was no decision of the Court of Appeal or the House of Lords on the point²⁶⁷

The European *jurisprudence* was mentioned as follows:

Of more immediate relevance to the present case the European Court of Human Rights has held in *Lingens v Austria* that the prosecution and conviction, under the

²⁶⁶[1992] 3 All ER 65.

²⁶⁷[1992] 3 All ER 65, 79.

Austrian law of criminal defamation, of a magazine publisher in Vienna for printing two articles critical of the Austrian Chancellor, was a violation of art 10²⁶⁸

On the other hand, Lord Keith reached his conclusion upon English common law but also examined the relevant ECHR case law and found English common law in line with the ECHR. Finally, a statement of Balcombe L J reminds us of his concern to make sure that English municipal law does not violate the ECHR, "where the law is uncertain, it must be right for the court to approach the issue before it with a predilection to ensure that our law should not involve a breach of art 10."²⁶⁹ Similarly, in the case *Rantzen v. Mirror Group Newspapers (1986) Ltd. and others*²⁷⁰ although the court respected the ECHR, the decision was nevertheless based on English common law:

If one applies these words it seems to us that the grant of an almost limitless discretion to a jury fails to provide a satisfactory measurement for deciding what is 'necessary in a democratic society' or 'justified by a pressing social need'. We consider therefore that the common law if properly understood requires the courts to subject large awards of damages to a more searching scrutiny than has been customary in the past.²⁷¹

This case dealt with an action for defamation brought by a television presenter against the defendants for articles in a national newspaper which she alleged meant that, knowing a teacher to be guilty of sexually abusing children, she had nevertheless protected him because of his past services to her in assisting the preparation of a programme about the sexual abuse of children. The jury awarded her damages of £ 250,000, and this decision was

²⁶⁸[1992] 3 All ER 65, 78.

²⁶⁹[1992] 3 All ER 65, 78.

²⁷⁰[1993] 4 All ER 975.

²⁷¹[1993] 4 All ER 975, 994.

appealed by the defendants. The Court of Appeal reduced the figure to £ 110,000.

So far, therefore, it could be said that the infiltration of the Convention took place in the minds of the lawyers who plead it for their clients, and to some extent to the minds of the judges who base their decisions on English common law which is found in line with the ECHR. Nonetheless, the ECHR has characteristics which make it be seen as "alien" by English judges because of its foreign drafting style, the fact that it involves more policy choices than that are used to and perhaps also the perception that:

[...] in some - although by no means all - areas the Convention encroaches on difficult and delicate areas of individual or social morality. Of course such issues arise in English law areas as well, but the judges are anxious not to tread further in those areas than they must.²⁷²

The debate over the possibility of incorporation reveals that the ECHR has not percolated to the minds of politicians in equal measure.

(c.2) Scots law

T. B. Smith wrote that:

At the end of the eighteenth century Scots law was a Civilian system comparable to that of France. Since then, especially as Scotland did not codify, English law has been by far the greatest foreign influence upon Scottish legal development, while French and other non-British law is only occasionally referred to in court. [...] With Ceylon, Quebec, Louisiana and South Africa, Scots law is a "mixed" system containing concepts and techniques of both Civil

²⁷² Francis G. Jacobs, "The Convention and the English judge" in: F. Matscher and H. Petzold (eds.), Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda, (1988), 275.

(Romanistic) law and Anglo-American law. To some extent Scots law has been able to bring English law into closer touch with Civilian ideas [...]²⁷³

Nevertheless, as regards the ECHR, Scots law²⁷⁴ did not seem especially welcoming of the continental (or otherwise) ideas set out in the ECHR and pursued the dualist approach to its logical end in cases such as *Kaur et al v Lord Advocate*²⁷⁵ where Lord Ross rejected the possibility of any infiltration of the Convention, "In my opinion the Convention cannot be regarded in any way as part of the municipal law of Scotland". He went on, "I accept that the Convention sets forth a number of very important principles relating to human rights, but the provisions of the Convention have never entered into the law of Scotland."

This case was the first that dealt in Scotland with the question of the status and authority of the ECHR in municipal law. It answered two questions: the first, what authority the ECHR has as regards the sources of law and the second, from where it derives such authority. The answer to the first was the same as in English law: the ECHR is a treaty with no binding force. Lord Ross draws our attention to the fact that the position in English and Scots law on this question was the same: "I respectfully agree with what Lord Diplock said *Salomon* [...] Under our constitution, it is the Queen in Parliament who legislates and not Her Majesty's government, and the court does not require to have regard to acts of Her Majesty's government when interpreting the law."²⁷⁶ Answering the second question, Lord Ross found "extremely difficult to comprehend" the English approach which maintained that the

²⁷³T. B. Smith, *Studies Critical and Comparative*, (1962), 44.

²⁷⁴Wilson Finnie, "The European Convention on Human Rights; Domestic Status", 1989 SLT 434.

²⁷⁵1981 SLT 322, 329.

²⁷⁶1981 SLT 322, 329.

ECHR was relevant when interpreting a statute. The ECHR has not been "transplanted" to Scots law, therefore, he said "If the Convention does not form part of the municipal law I do not see why the court should have regard to it at all."

Subsequent cases repeated this position. Lord Ross' view was ratified in 1985 by the Inner House of the Court of Session in *Moore v Secretary of State for Scotland*, "In our view Lord Ross was perfectly correct in holding that the Convention plays no part in our municipal law so long as it has not been introduced into it by legislation."²⁷⁷ Both *Kaur* and *Moore* "stand as twin watchdogs at the door of the legal system prohibiting entry of the Convention without legislative authority."²⁷⁸ What is the authority of the ECHR in Scotland according to those cases? Both cases denied the ECHR any capacity as a source of law because no "transplant" had taken place. The pressure of the ECHR to percolate is there, however. Example: in 1989 Lord Templeman appeared to derive guidance from Article 10 ECHR in finding the limits on the government's claims to restrain publication in the Scottish case of *Lord Advocate v Scotsman Publications Ltd*²⁷⁹ and was seen as "a welcome thaw in the approach of the Scottish courts to the Convention, earlier authorities having discounted its terms as entirely irrelevant to the process of interpreting domestic law, and having explicitly distinguished Scots law from English law on this point".²⁸⁰ The constitutional implications of "transplanting" the ECHR to United Kingdom "soil" are far reaching. The perception appears to be that, if the conceptions of the ECHR are left run freely within the domestic legal system, the present situation, which Lord Templeman described, as

²⁷⁷1985 SLT 38, 41.

²⁷⁸J. L. Murdoch, "The European Convention on Human Rights in Scots Law", [1991] PL 40.

²⁷⁹1989 SLT 705, 710. (HL)

²⁸⁰Neil Walker, "Spycatcher's Scottish Sequel", [1990] PL 354, 367.

regards the separation and balance of powers and the issues United Kingdom judges are expected to adjudicate on, will have to be changed:

[...] it is for Parliament to determine the restraints on freedom of expression which are necessary in a democratic society. The courts of this country should follow any guidance contained in a statute. If that guidance is inconsistent with the requirements of the Convention then that will be a matter for the Convention authorities and for the United Kingdom government. It will not be a matter for the courts.

There is resistance to the transplant, however, changes seem to be taking place anyway. Another Scottish case, *Re Budh Singh*²⁸¹ is less hostile to the Convention. In *Singh* the Outer House of the Court of Session had to decide whether the standard adopted by the Home Office amounted to a failure to respect the applicant's family life in breach of Article 8 ECHR. Although this is one particular case, in Lord Morison's argument Scots law appears to come to terms with the Convention:

[...] I agree with observations made with regard to Article 8 of the Convention in the context of illegal entry, by the European Court of Human Rights in the case of *Abdulaziz, Cabales and Balkandali*, in a judgment delivered on 28 May 1985 dealing with an issue similar to that raised in the present case.

Second, he required that the "European" principle contained in Article 8 ECHR be reflected in Home Office policy²⁸² in those terms "[...] if the policy of the Home Office is one which ignores the obvious humanitarian principle of respect for family life, it would in my view be unreasonable and subject to the Court's review [...]" Ultimately, however, there is no equivalent to a

²⁸¹ July 13, 1988, LEXIS.

²⁸² Rebecca M. M. Wallace, "Human Rights in Europe", in: *The Laws of Scotland. Stair Memorial Encyclopaedia*, (1992), 9.

Derbyshire C C case in Scotland as yet, so the infiltration of the ECHR in Scots law²⁸³ is very limited.

Conclusions

Although not all the member states of the Council of Europe have been taken into consideration in this chapter, the intention was to look at the "transplanted" ECHR as it inspires (or not) the process of interpretation of rules on the protection of human rights in the domestic courts in civilian, common law and mixed jurisdictions, and if so, to what extent. The statute books of the member states show that the status of the ECHR is different in each of them. In the previous chapter, it was pointed out that if legislative measures are taken in reaction to the ECHR no matter the legal tradition, statutory responses tend not to differ greatly. A similar look at their case books is therefore more helpful to see the positions of national courts in relation to the interpretation of the "transplanted" Convention and the extent to which the "transplant" has been taking root.

A common element in all the countries is their responsibility in international law since they signed up for the ECHR. The supranational instrument was apparently "transplanted" to them this way, however, the position of the ECHR in domestic law is not the same everywhere. The tension between unity and diversity appears as one between the "infiltrated" or "transplanted" ECHR and the diversity of local legal systems (and conditions) which introduce

²⁸³The case *Martin v City of Edinburgh District Council* 1988 SLT 329, 330, makes an incidental reference to the ECHR. In this case the Outer House of the Court of Session found that the Council had failed in their duty as trustees of public and charitable funds when they made some investments in South Africa. Lord Murray said that the case dealt solely with the actings of members of the Council, but in the *dicta* of the case, it was recognised, although in a rather sweeping statement, that "[this case] is not about the legality or morality of apartheid. [...] apartheid would not be legally enforceable in Scotland if only because of its apparent incompatibility with the Race Relations Act 1976, and with art. 14 of the European Convention on Human Rights."

the pull of diversity and determine different outcomes in different jurisdictions. It is not possible, however, to speak of an outright "rejection" of the ECHR because the struggle between unity and diversity is an on-going tension and besides, transplants may take time to take root.

Local conditions opposing the "transplant" are various. National courts are reluctant to let provisions of international law prevail over national law, especially in this sensitive area. Pleading the ECHR in domestic law is often tantamount to an obstacle course.²⁸⁴ National judges may not be aware of the ECHR, Strasbourg case law may not be readily accessible to them and adequate searches involve time and expense. Researching the law of the Strasbourg human rights system requires different skills from those used in a national system. No doubt, also, the relatively recent start of the teaching of the Convention system at law school level and in refreshing courses contributed to the comparatively low awareness of the ECHR by the legal profession. The case law, which has been deployed in this chapter in chronological order as far as possible, shows that the ECHR is applied according to domestic instincts (that is, ignoring the Strasbourg case law) at first in all jurisdictions but after some time, both practising lawyers and the bench gain more confidence and gradually tend to overcome their reluctance to seek guidance from the ECHR.

The ECHR "infiltrates" its own assumptions into the legal systems of the member states and these may clash with the existing ones. The assertion "One system's common sense is another system's absurdity"²⁸⁵ sums up the many

²⁸⁴And it does not get any better before the Strasbourg organs where the complainant has to face various material and logistic difficulties. See, e.g. Andrew Drzemczewski, "The need for a radical overhaul", *NLJ*, 29.01.93, 134.

²⁸⁵David Pugsley, The Strange Case of the Exploding Motorbike and other Cases French and Italian, (1991), 1.

challenges that defy outsiders to a legal system and Strasbourg was no exception to these considerations. Moreover, the ECHR touches upon an area of public law where the "spirit" of the law is strongly influenced everywhere by its origins, its historical development and the political opinions of the government and the governed, as human rights policies have a far-reaching impact on the legal system of any country.²⁸⁶ Constitutional law issues, important or otherwise, are involved in the domestic application of the ECHR. They make up, together with the domestic legal system, the different "soils" to which the ECHR is "transplanted". A constant element is that the ECHR (through those who claim it) tries to percolate through to domestic law in order to be applied by domestic courts and fill in the gaps of municipal law or to eliminate uncertainties in the domestic statutory and non-statutory law of rights and freedoms. As it was the case of English law in colonial Africa, local conditions determine that "transplants" grow differently in the different "soils". Some of the questions involved, however, were only concerns over constitutional "correctness" although their sway should not be underestimated. In the United Kingdom, the ECHR is viewed as capable of altering the separation and balance of constitutional powers or what judges are expected to adjudicate on. Many have suggested the entrenchment of a Bill of Rights as a possible solution for the difficulties of the ECHR in the United Kingdom, although apparently, this option runs counter to the constitutional argument of continuing parliamentary sovereignty. Constitutional law complications do not stop at the British side of the Channel. French judges were so much influenced by the doctrine of the inviolability of statutes which was part and parcel of the theory of the separation of powers as it

²⁸⁶It was precisely in the field of human rights where the constitutional courts of Federal Germany and Italy were more reluctant to give the green light to a supranational system which they considered too weak a constitutional foundation to protect the rights and freedoms of their citizens.

was understood in France, that before the Council of State's decision in *Nicolo* (1989), the three supreme courts were not agreed on the position of international law (ECHR included) in domestic law. Besides, demonstrations of national pride such as "La France est le terrain, est la patrie des droits de l'homme" surely slow down the process of infiltration. Unsurprisingly, Judge Pettiti complained in 1988 about the difficulties to convince French judges that they could contradict a domestic statute.²⁸⁷ In France, for example, the hurdle concerning the position of international law (and hence, the ECHR) in domestic law had to be cleared first before deriving any guidance from the ECHR. The cases show that national judges now stop to ponder how far the ECHR and also the Strasbourg decisions are binding on them. In Italy, the decisions mix the position and the use that can be made of the ECHR, as in the United Kingdom. After 1989, however, the French have the edge on the Italians and the British on the domestic use of the ECHR as the stronger position of the ECHR in that country facilitates claiming the Convention before a domestic court, grants the Convention supremacy over opposing legislation and perhaps allows more room for a "complicity" between Strasbourg and the domestic courts. In contrast, in Italy, the ECHR law has to face the vulnerability of its weak position in the domestic hierarchy of norms. For the civilians, the position of a statute in domestic law has to be clarified first, then, it can be "applied" (deductively) to a situation. The difference between France and Italy in this respect illustrates that the ECHR took firmer "roots" in the first than in the latter. The differences have to do, among other things, with the different conditions encountered by the "transplanted" Convention. In Italy, no statute is unconstitutional on the sole basis of being contrary to the ECHR because the

²⁸⁷Louis-Edmond Pettiti, *ibid.*

ECHR is regarded as ordinary legislation and as such it is under the constant threat from other enactments under the principle *legi posterior derogat priori*. Several unsuccessful attempts to "constitutionalise" the ECHR were made by scholarly writers in order to negotiate this obstruction but Italian courts do not accept such thesis nor the argument that the ECHR could be assimilated to EU law. This situation may, in turn, drive citizens to look for justice elsewhere and therefore partly explain the Italian record in Strasbourg.²⁸⁸

The language barrier²⁸⁹ is another serious obstacle which contributes to the slow "infiltration". It is not just an issue of the availability of translations of European case law, but the difficulty has to do with the legal habits and customs deeply linked to a legal system's vocabulary (and jargon) that make case law translations so difficult.

Domestic systems are not the only culprits in the slow "growth" of the Convention law. Although the observation does not necessarily reflect negatively on the Strasbourg system, it is well known that the European organs took several years to reach the present position where a sizable body of sufficiently varied case law²⁹⁰ is made available to the member states and which is able to provide interpretational guidance if resorted to. Extra-legal factors also had an influence in this matter. To name one, the perception that unlike the law applicable to international business transactions (for example, shipping or bills and payment) or to rights of immediate commercial

²⁸⁸Giorgio Grigori, Il giudice italiano di fronte alla Convenzione europea, (1980), 217.

²⁸⁹Martin Weston, An English Reader's Guide to the French Legal System, (1991), 143.

The author is a translator at the Registry of the European Court of Human Rights in Strasbourg and highlights the importance of carrying out conscious translations instead of transpositions word for word as legal translations are full of "culture-bound" legal terms.

²⁹⁰For instance, in the United Kingdom report: Legislation on Human Rights with particular reference to the European Convention on Human Rights: A Discussion Document, June 1976, the issue in 1975 as regards whether the UK should be enjoined to interpret the ECHR in accordance with the decisions of the European Court of Human Rights when there were only 12. The case law of the Commission was more abundant, but this is not binding.

value (for example patents and copyrights) the need for a harmonised approach to the protection of human rights is less pressing.²⁹¹

Nonetheless, the impression overall is that the "transplant" seems to be taking its time to "grow". It is too early to detect a full start even in those countries where the ECHR has been incorporated (or where it is pleaded more often), but there is a trend in the developments surveyed in this chapter showing the direction in which things are moving. Even in jurisdictions reluctant to resort to the Convention, the courts had at least to reach a decision on whether or not to use the ECHR pleaded before them. The possibility of a "complicity" between national and supranational judiciary gives evidence of the ECHR "taking root" and means that national judiciaries would become more aware of the developments in Strasbourg in which case they could show more enthusiasm for the European case law and import "European" solutions more readily. This eagerness would come out of reciprocal understanding and not of the fear of a reversal by the European organs. "By looking at what actually happens, we can see that a system of European public law is progressively taking shape. By reflecting upon its course, we can also discover that the system will continue to develop."²⁹² It is a very slow process²⁹³ and the differences of legal systems and approaches to the adjudication of human rights in the member states are not bound to disappear too soon.

For various reasons (the status and capacity to achieve primacy in municipal law play an important part in this), however, the ECHR does not resolve all possible conflicts

²⁹¹In addition, commercial relations are more developed than international relations between national administrations or between the citizens of one state and the administration of another. See J. Schwarze, European Administrative Law, (1992), 76-77.

²⁹²T Koopmans, "European Public Law: Reality and Prospects", [1991] PL 53, 63.

²⁹³P. van Dijk and G. J. H. van Hoof, id., 14.

between remedies available in domestic law and itself. Those are the cases that will be resolved outside the legal systems of the nation-states: the European organs in Strasbourg. The present situation where many complainants seeking protection of their Convention rights must still rely on the enforcement procedures in the ECHR itself and take their cases to Strasbourg, may make us sceptical about the extent of the impact of the Convention on the day-to-day work of the domestic courts. The right of individual petition of Article 25 ECHR together with the passage of time, marked an expansion of the ECHR's infiltration, but this time through the European judgments, all over the member states.

The constant pressure put by the ECHR on the member states, "knocking at their doors" and seeking to infiltrate their municipal law, appears to be the main agent of further harmonisation. The continuous reference to the transplanted Convention by the domestic courts, especially requested by the individual complainants, works as a unifying element despite the different answers given by the different systems to the same questions, proving that "transplants" of laws "grow" differently in different environments. Had it been otherwise the Strasbourg machinery would have become superfluous by now.

Decision-making and interpretation in Strasbourg: the yardstick

*Purely paper declarations, however, are rightly discredited. Our statement will have force only if it is converted into action, and the most immediate and practical way of doing this is by the adoption of a Charter of Human Rights, coupled with a definite method of enforcement.*²⁹⁴

*Freedom and respect for the individual are not mere words, but are powerful and dynamic forces binding men throughout the free world and leading us to the true goal - a united free world capable of sustaining itself in peace and war against whatever force may assail it.*²⁹⁵

Introduction

The infiltration of the ECHR in domestic law should not leave us with the impression that the Strasbourg system sternly sets standards for the member states to follow. In fact, the ECHR and its system, in a truly democratic fashion, was produced out of the (legal) traditions of the member states and created with influences from the bottom up. The aim of this chapter is therefore not to describe the familiar contents of the ECHR or to dwell on the diplomatic and political history of the drafting, which

²⁹⁴Lord Layton, intervention at the "First session of the Consultative Assembly Held at Strasbourg 10 th August to 8th September 1949, sittings held from 16 th August to 8th September 1949", Section A: sittings of the Consultative Assembly (1st session, 5th sitting), in: Collected Edition of the Travaux préparatoires, volume I, (1975).

²⁹⁵Mr. Ernest Davis, British Foreign Secretary, at the ceremony of signing the ECHR, 40.

will only be mentioned to cast incidental light as the backdrop out of which the ECHR emerged. The goal is to concentrate on the impact of the thought patterns of the legal traditions as they appeared in the interventions of the delegates in the drafting sessions and their advice on the way rights were to be laid out. The tension between unity and diversity became alive in the delegates' interventions as a struggle between the appeal to universal (or at least "Europe-wide") human rights principles and the effect of the multiplicity of the national legal (and political) systems that they, perhaps even subconsciously, brought to the discussions. This study is based primarily on evidence drawn from the *travaux préparatoires* of the ECHR and the first protocol, and along with secondary sources, the works of some participants to the negotiations are taken into account.²⁹⁶

The Strasbourg system of protection: the appeal of universal principles

The origins of the Council of Europe bear the hallmark of the "Europe-wide" principles present on the minds of the founding fathers. In 1948, at The Hague Congress of the European Movement there was an initiative to create a Consultative Assembly at the suggestion of the Belgian and French governments to which the United Kingdom counter-proposed a Council of Ministers. A study committee which was set up in January 1949 suggested the implementation of both proposals. The United Kingdom agreed to this other initiative on condition that only recommendations unanimously approved by the Council could be addressed to

²⁹⁶The Committee of Experts in charge of the largest part of the drafting work in February and March 1950 discussed many documents, i.e. recommendations of the Assembly, proposals and amendments of the delegations, papers prepared by the Secretariat, general accounts of the interventions and so on. No verbatim reports of the actual interventions in the discussions were made at the time. The reports of the Conference of Senior Officials which met in June 1950 were published as a collected edition of the *travaux préparatoires*.

governments.²⁹⁷ The Scandinavian countries and Italy were brought into consultation and a conference of ambassadors drew up the Statute of the Council of Europe, a compromise solution, which was signed on May 5, 1949.²⁹⁸ Some of the ideas of the founding fathers were translated into the creation of the following bodies: a Consultative Assembly, a Committee of Ministers and a General Secretariat. Insisting on the common traditions shared by all Europeans, in the First Session of the Consultative Assembly a resolution was adopted which read: "that the aim of the Council of Europe is the setting up of a European political authority with limited functions but real powers." (September 6, 1949) The decision to draft a European Convention was reached when it became clear that it would take a long time to turn into binding treaty obligations the Universal Declaration of Human Rights passed on December 10, 1948, by the General Assembly of the United Nations.²⁹⁹ It should be said that the ECHR was the first convention concluded between the member states of the Council of Europe.

The pull towards unity and universality can be seen in the goal to reaffirm the principles of the Western European countries' political faith and their common spiritual and moral values in relation to the threat of communism.³⁰⁰ The system they sought to create was devised to protect a

²⁹⁷This compromise was a result of the prevailing Continental position favouring a European Assembly and the British reluctance in going along with the European ideas that they had helped, in a sense, to initiate. Arnold J. Zurcher, The Struggle to Unite Europe 1940-1958, (1958), 38. Also relevant for this study are: U. Leone, Le origine diplomatiche del Consiglio d'Europa, (1966) and C. Melchior de Molènes, L'Europe de Strasbourg: Une première expérience de parlementarisme international, (1971).

²⁹⁸Important dates in the calendar of the Council of Europe are as follows: 1949: foundation of the Council of Europe; 1950: signature of the ECHR; 1953: entry into force of the ECHR (on September 3, 1953); 1954: creation of the European Commission of Human Rights; 1955: entry into force of the right of individual petition; 1959: creation of the European Court of Human Rights; 1961: signature of the European Social Charter; 1965: entry into force of the European Social Charter; and 1989: signature of the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment. In the early 1990s: entry of East European countries.

²⁹⁹Thomas Buergenthal, International Human Rights in a Nutshell, (1988), 83.

³⁰⁰A. H. Robertson, op. cit., 4.

European (and Western) asset, "the dignity of man"³⁰¹ founded on the "Greek notion of the individual, the Roman notion of the citizen and the Christian notion of man".³⁰² All these values were threatened by totalitarianism: Nazism and World War II in the Convention authors' very near past and the Soviet tyranny in the authors' cold war present. Within the Council of Europe, these aspirations would be reached by actively promoting a greater unity between its members by the conclusion of agreements and by encouraging common action in numerous fields except military. For the system, the safeguard of rights and freedoms of the individual was a prerequisite for democracy as well as the respect for the rule of law.³⁰³ In the words of the Irish Minister at the ceremony of signature of the ECHR:

The present struggle is one which is largely being fought in the minds and the consciences of mankind. In this struggle I have always felt we lacked a clearly defined charter which set out unambiguously the rights we as democrats guarantee to our people. This Convention is a step in this direction.³⁰⁴

The pull of diversity was also vigorous, and despite (some) founders' idea of the Council of Europe as a germ for a united Europe, it was conceived as an inter-governmental organisation for co-operation between states.³⁰⁵ The Statute of the Council of Europe was signed in London on May 5, 1949. It proved a disappointment for the "strong" Europeans because too much was surrendered to the British Government who, although it appeared in favour of union in reality it was not:

³⁰¹Polys Modinos, "Effects and Repercussions of the European Convention on Human Rights", (1962) 11 ICLQ 1097, 1097.

³⁰²Polys Modinos, op. cit., 1107.

³⁰³The Council of Europe. Its development and future perspectives, Publications and Documents Division of the Council of Europe, (1990), 1.

³⁰⁴Charter of Freedom, op. cit.

³⁰⁵Thomas Ouchterlony, "The Council of Europe in the New Europe", address to the European Communities Studies Group, Europa Institute, University of Edinburgh, October 11, 1991, 2.

What had come into being had been strongly colored by the Continental effort to placate official British opinion. The aim had been to bring Britain into a European structure and, in pursuance of that aim, so much had been compromised and so much had been surrendered of what was essential to even a modicum of union, that the final result was far less than the minimum that many Continental advocates of union believed was compatible with their ideals.³⁰⁶

The failure of all proposals with a constitutional content in November 1949 and again in November 1950 has been attributed to the British veto and the situation eventually led six members to press ahead and create the Europe of the Six.³⁰⁷ The United Kingdom itself was pulled by two forces moving in opposite directions at that time: on the one hand, the fraternity of English-speaking nations³⁰⁸ expressed in terms such as "Great Britain is herself the centre of a free and worldwide commonwealth of States"³⁰⁹ and on the other, its ties with the Continental Europeans. Obviously, the United Kingdom is in geographical proximity to the Continent and after the war, it shared with the continentals the general weakness in which the country was left, the Marshall aid and also, the fact of being associated in a movement leading to integration and which counted influential United Kingdom people among its members.³¹⁰

³⁰⁶Arnold J. Zurcher, op. cit., 41.

³⁰⁷Walter Lippens, Sources for the History of European Integration (1945-1955): A Guide to Archives in the Countries of the Community, (1980), 171.

³⁰⁸Perhaps an observation on the state of the "special relationship" made by the outgoing United States ambassador to the United Kingdom in April 1994 is an indication that the situation is already much changed: "[...] America's transatlantic policy is European in scope. It is not a series of individual or compartmentalised bilateral policies, and never has been. It is the policy of one continent to another. There is a simple observation that if Britain's voice is less influential in Paris or Bonn, it is likely to be less influential in Washington." The Times, April 20, 1994. "Britain belongs to Europe; Raymond Seitz on the state of the special relationship".

³⁰⁹Sir Winston S. Churchill, "Council of the European Movement; A Speech at the Salle des Beaux Arts, Brussels, 26 February 1949", in: Randolph S. Churchill (ed.), "In the Balance; Speeches 1949 and 1950 by Winston S. Churchill", (1951), 29.

³¹⁰Jacques Freymond, Western Europe Since the War, (1965), 45.

Nonetheless, some important "Europe-wide" ideas of universal appeal were present in the creation of the Council of Europe. As the newly created institution required that all member states accept "the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms"³¹¹, the First Session of the Assembly considered the measures necessary to fulfil a mission which eventually led the Council of Europe to produce the ECHR. The insistence on the preparation of a single code of rights, Europe-wide, in a sense was putting in practice the lesson so painfully learnt in the war that respect for human rights concerned individual people and their countries as well as the international community.³¹² The internationalisation of protection, meaning Europeanisation in the context of this supranational regional organisation, was well put by the Norwegian Minister, Mr. Halvard Lange, at the ceremony of the signature of the ECHR in Rome:

Until to-day this protection of human rights has been achieved on a purely national plane. The Convention which we are signing today brings the protection of the fundamental rights of the individual on to a European plane.³¹³

The German Minister Dr. Hallstein, a strong³¹⁴ supporter of the European idea, thought that:

To have achieved this agreement is an act of essential progress in the grand European idea, and we are very happy about it. We are also convinced that it opens the way for further progress either in developing this agreement or in other fields of European activity.³¹⁵

³¹¹Art. 3 of the Statute of the Council of Europe.

³¹²Rolv Ryssdal, The future of the European Court of Human Rights, (1990), document ECOUR90296.AB),1.

³¹³Charter of Freedom, special edition of the News from Strasbourg, November 1950.

³¹⁴Arnold J. Zurcher, op.cit.,168.

³¹⁵Charter of Freedom, op. cit.

The French representative's intervention in the Second Session of the Consultative Assembly revealed that the oppressive experiences of World War II were fresh on the minds of the Ministers, who wanted to safeguard democracy and prevent dictatorship at all cost. Mr. Teitgen's idea had even a wider scope, as he suggested to devise an international mechanism which could be "triggered" should any member state slip into the path of dictatorship³¹⁶ in order to revert promptly such state of affairs:

intervention by the European Court must be possible immediately after a totalitarian dictatorship has been set up. It is from the very first day, from the day of the assassination of a Matteotti, from the day of a Reichstag fire, it is from that very moment that it must be able to intervene, and to intervene on grounds such as these: "You have suppressed free institutions, you have just suppressed or reduced the scope of universal suffrage and free opinion, you are now getting ready to suppress political opposition, consequently the European guarantee operates and is set in motion." If we were to reject this possibility, our system would lose the greater part of its political efficacy.³¹⁷

These notions are powerful guiding ideals for the Strasbourg system and they periodically emerge in the decision-making process of the European organs as the archetype of one European system of human rights protection. In the case law of the European Court of Human Rights there are still echoes, as will be seen, of the ideas behind the proposal made at The Hague Congress in 1948 to invite all European governments to subscribe to a common declaration on fundamental personal and civic rights, and which, in the end, fructified in the decision to draft the ECHR.

³¹⁶A. H. Robertson, Human Rights in Europe, 2nd. ed. (1977), 3.

³¹⁷First part of second session of the Consultative Assembly, Collected Edition of the Travaux préparatoires, volume V, 294.

The effect of the multiplicity of the national legal (and political) systems on the origins of the ECHR: the legal traditions shaping the drafting of the Convention

While political considerations played an important part in the final shape of the ECHR, the struggle between the "enumeration theory" and the "definition theory" which divided the participants to the discussions is at least quite suggestive because the positions correspond surprisingly with the divide between the legal traditions. As the late A. H. Robertson put it, the trial of strength was one that boiled down to "fundamentally a difference between the civil law approach and the common law approach"³¹⁸ visible in the efforts of the member states to shape the ECHR to a degree in the image of their own national law and way of legal thinking. Indeed, it has been pointed out (tongue-in-cheek) that those differences of approaches can usually be observed in negotiations between the British and the French, "the British distrusting the attitude of the French who start with general considerations and postpone negotiations about details, and the French not understanding why the British talk endlessly about what the French consider as 'nickels and dimes' among the issues to be discussed."³¹⁹ There was an element of this in the legal drafting discussions.

Admittedly, the delegates' interventions may have been biased or perhaps obscured by policy considerations or simply rhetoric. Moreover, it may well be that in truth they were wrapping in legal arguments, for the sake of their presentability, more profound differences among them which they declined to voice for diplomatic and political reasons. If this was the case, then they must have

³¹⁸A. H. Robertson, "The European Convention for the Protection of Human Rights", (1950) 27 BYIL 145, 151.

³¹⁹J. F. Nijboer, "Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective", (1993) 41 AJCL 299, 320.

certainly been very well packaged as legal arguments, so as to make, for example, A. H. Robertson, depict the struggle in terms of a gulf between civilian and common lawyers. The lawyers (and diplomats) from each country have their own different ways of understanding things of which they may even be imperfectly aware. As the legal traditions of the member states point in different directions in many areas of the law, among those, legal drafting, not surprisingly, the discussions held in 1949/1950 in Strasbourg show to a remarkable extent the imprint of the characteristic styles of legal thought in the relevant legal families.

This drafting controversy should be set against the wider context of the tensions between an adhesion to universal principles versus the scattering effect brought by the diversity of traditions of the national legal systems. Today in the Strasbourg human rights system, these pressures between the European and the national elements still appear in its various tasks. It goes without saying that each member state still has its own history, culture, and very relevant to us, at least one legal system.

From the First Session of the Consultative Assembly, therefore, the discussions were imbued with the awareness of diversity inherent in the idea of Europe. The important question was, therefore, could a European human rights system be devised so as to be suitable "for Scotchmen and Sicilians, for Germans and Frenchmen, for the English and the Neapolitans?"³²⁰ The answer from the

³²⁰The answer from, for example, the nineteenth century English economist and journalist Walter Bagehot would have been "no". According to K.C. Wheare, "Lecture on a Master Mind 1974: Walter Bagehot", (1974), 12, Bagehot had developed the view that national character was a paramount factor in determining a country's political and constitutional questions. Perhaps Jean-Jacques Rousseau was more accurate when he suggested that the issue was the other way around and pointed out that: "Il est certain que les peuples sont, à la longue, ce que le gouvernement les fait être" (quoted by R. C. van Caenegem, Judges, Legislators and Professors: Chapters in European Legal History, (1985), 72, from Rousseau's article on Political Economy in the *Encyclopédie* of 1735.) Whatever the case, notions of national character are viewed with suspicion today and even more so by those

Assembly was in the affirmative and on August 19, 1949, it debated the proposal to establish an organisation within the Council of Europe to ensure the collective guarantee of human rights. Viewed from the mid-1990s, the human rights field is one where several legal systems overlap, therefore, it seems that the Danish representative was correct when he observed: "Coming as we do from very different nations, we can have scarcely any doubt on this point. We shall continue to be what we are - Europeans, but at the same time Englishmen, Frenchmen, Greeks, Norwegians, Swedes, Dutch, Irishmen, Belgians, Luxembourgers, Italians, Turks and Danes, born and bred."³²¹

The proposal for a collective guarantee of human rights was referred to the Committee on Legal and Administrative Questions with Sir David Maxwell Fyfe³²² (President) from the United Kingdom, Mr. Antonio Azara (Vice-Chairman) from Italy and Mr. Pierre-Henri Teitgen (Reporter) from France. The latter supplied the Assembly with a report and a draft based on the Universal Declaration that had been passed by the United Nations on September 8, 1949. In order to look into the Assembly's proposals and prepare a draft, the Committee of Ministers of the Council of Europe called a committee of governmental experts to Strasbourg in November 1949. This committee of experts met in February and March 1950 and prepared a draft Convention based on the proposals of the Consultative Assembly. They failed, however, to reach agreement on other items, for example, the creation of a European Court.

In this committee of (legal) experts there was a patent division between civilian and common lawyers, who could not agree on whether rights should be merely enumerated or

"strong" Europeans of the mid-twentieth century who answered this question with a clear "yes".

³²¹Collected Edition of the Travaux préparatoires, volume I, 66.

³²²Later Lord Chancellor Kilmuir.

conversely, defined in detail, that is, with the inclusion of the permitted limitations and restrictions. In the course of its sessions the committee set up several subcommittees to examine and co-ordinate the submission of amendments, proposals and drafts by the members.³²³ The activities of one of those sub-committees seems specially interesting.³²⁴ The record acknowledges that there were differences in the methodology which appeared as soon as they convened and reads as follows: "Right from the beginning of the discussions, two main schools of thought were expressed in the Committee with regard to the method to be adopted for carrying out the mission with which it had been entrusted".³²⁵ The record also disclosed that at this stage the United Kingdom (and the Netherlands, which is also mentioned on this occasion) appeared favouring a precise definition of the rights to be safeguarded, while France and Italy backed a proclamation of general principles:

Certain members, however - particularly the representatives of the United Kingdom and the Netherlands - considered that the fundamental rights to be safeguarded, and, even more important, the limitations of these rights, should be defined in this Convention in as detailed a manner as possible. These members felt that it would be impossible for States to undertake to respect rights which had not been defined sufficiently precisely.³²⁶

Although the Belgian representative shared the views of his Italian and French counterparts he did not flatly oppose the "definition theory" showing therefore a pragmatic approach and a willingness to compromise probably convinced that yet to come perfection was no

³²³ Meetings of the Committee of Experts held in Strasbourg from 2 to 8 February 1950 and 6 to 10 March 1950, in: Collected Edition of the Travaux préparatoires, volume IV, (1975), 8.

³²⁴ Committee consisting of Mr. de la Vallée-Poussin (Belgium), Mr. Chaumont (France), Mr. Perassi (Italy), Mr. Salen (Sweden), Mr. Ustun (Turkey) and Sir Oscar Dowson (United Kingdom) who met on the mornings of February 4th to the 6th. Collected Edition of the Travaux préparatoires, volume IV, 252-4.

³²⁵ Collected Edition of the Travaux préparatoires, volume IV, 252.

³²⁶ Collected Edition of the Travaux préparatoires, volume IV, 254.

good: "Even an incomplete Convention might render useful service, pending the conclusion of a better one."³²⁷

On the other hand, the position of the United Kingdom was clearly repeated by Sir Oscar Dowson later in the same minute. There is an additional minute which repeats almost word for word the paragraphs just quoted in which, however, the United Kingdom appeared as the only one insisting on the detailed description of rights³²⁸ and the dissimilarity between the United Kingdom and the rest of the member states becomes deeper.³²⁹ The United Kingdom representative's intervention supplies further details about his country's dissatisfaction with the (mere) listings of the Assembly's draft: "how could a country feel sure that its laws were consistent with the obligations it would assume on accession if it did not know precisely what were the obligations involved?"³³⁰

In addition, not all the continental countries appeared to rally to Italy's support, whose representatives put the opposite view on Convention drafting and with almost equal vehemence. The contrast between the British and the Italian position on the issue is conspicuous. The Italian representatives' view appeared to be guided by the idea that a general and abstract statement set down in statutory form will then be "applied" to a concrete situation by a court, as it was impossible to spell out all the numerous restrictions rights could be subjected to. They insisted on the need to set out general rules and supported their opinion against detailed definitions with the following example:

In any case, in order to cover them all by the Convention it would be necessary to add to the

³²⁷Collected Edition of the Travaux préparatoires, volume IV, 258.

³²⁸Meetings of the Committee of Experts held in Strasbourg from 2 to 8 February 1950 and 6 to 10 March 1950, in: Collected Edition of the Travaux préparatoires, volume IV, (1975), 8.

³²⁹Collected Edition of the Travaux préparatoires, volume IV, 10.

³³⁰Collected Edition of the Travaux préparatoires, volume IV, 10.

detailed list of restrictions a certain number of general rules. As an example, it might be well to draw the attention of the Ministers to the list of restrictions which the United Nations Commission had drawn up with regard to freedom of expression [...] The restrictions enumerated in this list contained a large number of general principles which deprived them of the precision for which the partisans of the United Nations Commission's methods were aiming. (For example the idea "detrimental for public decency or morals" - exception No. 4 -; "proper conduct of political elections" - exception No. 7 -; "national safety" - exception No. 9 -; "profanity" - exception No. 11 -; etc.)³³¹

The conclusion that can be drawn from this opposition is that the two contrasting points of view appear to depict in some degree the different way sources are perceived in the United Kingdom and Continental Europe. Although in practice statutory law has supplanted the common law as the dominant source, there is still a tendency to consider the common law as a provider of solutions to an endless series of specific disputes and not as a source of general rules of conduct for the future. This is an assumption that, by colouring the way of thinking, shapes the style of legislation, which, in the interest of certainty, shows a good deal of concern with specifying how the rules should be applied in particular circumstances.³³² In addition, there is another element. The idea of a Bill of Rights as such may run counter to a system where there are no formal limits to the validity of Parliamentary legislation and where freedom is considered "residual" because rights are not spelled out in writing.³³³

The tone of the discussions - as it appears from the interventions reported in the *Travaux* - was of very entrenched and firm positions. It can be inferred from

³³¹Collected Edition of the *Travaux préparatoires*, volume IV, 12.

³³²John Bridge, "National Legal Tradition and Community Law: Legislative Drafting and Judicial Interpretation in England and the European Community", (1981) *Journal of Common Market Studies* 351, 354.

³³³See Chapter 3.

the footings of the reported interventions that the discrepancies between the participants sprang mainly from their familiarity with their respective legal systems and, it can be hypothesized, from the expectation that the other system would fail in achieving the proposed goal, that is, to produce a "workable" Convention. It is speculated that the participants in these discussions were generalising from their experience in their systems and in certain measure failed to understand how different the situation was or could be in a European context. Perhaps due to the infancy of the first European attempts at integration in 1949 and 1950 they found it difficult to think in European terms particularly as regards the different ways things can be done in different systems.

The report keeps revealing that the polarisation between the traditions was quite marked at all times. Finally, the representative of the Netherlands joined the French on a remark on methodology where the "definition" approach was attributed to the British representatives alone.³³⁴

The "enumeration" theory was also seen as capable of increasing the chances of approval by their respective countries, as it would give them more leeway to implement a Convention which was to be "transplanted" to their legal orders. The methodological preferences propounded by the Belgian and French representatives were supportive of this position. They joined the Italian representative to insist on the importance of making a statement of the general principles of law the Convention should take into consideration.³³⁵

These negotiations revealed how deeply ingrained certain practices can be in a legal system. Similarly, the tensions produced by such deep-rooted practices and of

³³⁴Collected Edition of the Travaux préparatoires, volume IV, 12.

³³⁵Collected Edition of the Travaux préparatoires, volume IV, 14.

multinational membership can be observed in the adjudication work of the European Court and in the screening activities of the Commission. Lawyers of dissimilar credentials must contribute to a "European" outcome acceptable in all member states. Patterns of behaviour tend to recur, and the tension between the legal traditions will re-appear many times in the Court under the external appearance of the divisions between the majority ruling and the dissenting opinions capable of splitting the Court as sharply as the different assumptions on legal drafting divided those involved in the preparation of the Convention.

As it is also the case of the Court, not all outcomes can be explained as the product of the struggle between the legal traditions involved. Nonetheless, legal considerations had their weight, particularly in view of the fact that what was being drafted was a legal document. The committee of experts submitted a report to the Committee of Ministers with a number of alternative texts adducing an impossibility to merge the common law approach of the text of the articles defining human rights submitted by the United Kingdom and the continental approach, in the form of the listings of the Assembly's draft. Above all, this realisation can be taken to mean that in the end the participants recognised that it was possible to reach a Convention by either of the two *legal* approaches, and having exhausted all *legal* considerations, then the final selection was to be made on political criteria. They said that: "the choice between the two systems should be decided in the light of political rather than legal considerations"³³⁶ and for this purpose, four alternatives were submitted, the Assembly's and the United Kingdom's proposals which included the creation of a

³³⁶Collected Edition of the Travaux préparatoires, volume IV, 16.

Commission only and the same two proposals including the creation of a Court in addition to a Commission.³³⁷

The Committee of Ministers was issued with a number of alternative texts and after considering this report, they convened a meeting of senior officials in order to take the required political decisions. The senior officials met in June 1950 and prepared a draft Convention adopting a compromise formula. The Committee of Ministers' attitude appeared to reinforce the conclusions just stated. In their view:

The Committee decided that it was impossible to amalgamate the text of the Articles defining human rights in the United Kingdom proposals and the text of the Articles listing these rights in the Assembly's draft, since the systems on which these two drafts were based were essentially different.³³⁸

In August 1950, the Committee of Ministers considered the report of the Senior Officials together with the comments issued by the Assembly's Committee on Legal and Administrative Questions. On August 7, 1950, they adopted a revised text that watered down the original proposals of the Assembly as the right of individual petition was made conditional and the jurisdiction of the Court optional.³³⁹

The revised text was subsequently submitted to the Assembly and again considered by the Legal Committee, whose report was approved by the Assembly on August 25, 1950. At the meeting in Rome in November 1950 the Committee of Ministers dealt with the drafts again. Mr. Teitgen, the French representative, explained why the Assembly's original draft of the ECHR was replaced by a

³³⁷Appendix to the Report of the Committee of Experts on Human Rights: Draft Convention of Protection of Human Rights and Fundamental Freedoms (Doc. CM/WP 1 (50) 15 appendix; CM/WP 1 (50) 14 revised, A 925, 16th March 1950, in: Collected Edition of the Travaux préparatoires, volume IV, (1975), 50.

³³⁸Collected Edition of the Travaux préparatoires, volume IV, 16.

³³⁹Group of Officials of the Secretariat, Manual of the Council of Europe; Structure, Functions and Achievements, (1970), 262-3.

list of defined rights and freedoms, and although he did not find it satisfactory, the change of approach accepted by the Committee of Ministers was a result of the United Kingdom insistence:

At the request of the United Kingdom experts, the Ministers have set out to replace our list by a series of definitions. They have tried to state in positive terms what is included and what is not included in the rights and freedoms to be guaranteed.³⁴⁰

The legal gulf between the British and the continentals did not escape the attention of Mr. Teitgen when he reinstated France's position, which was similar to the worries of the Italian representative. The continental way of drafting was probably on his mind when he made a connection between drafting and legal interpretation:

The definitions put forward by the British might well be dangerous, indeed, if they were to be taken as restrictive, for it is extremely difficult to list all the possibilities contained in a single freedom and all those excluded therefrom. There is always a danger that the list will be incomplete. It would be easy for me, indeed, to take the Committee of Ministers' text and to demonstrate to you, in respect of certain of the freedoms there defined, that the formula proposed contains either obscurities or serious gaps.³⁴¹

The (civilian) ideal of the law as capable of regulating an area in a complete way, with no gaps, overlappings, contradictions or ambiguities could be achieved if the gaps which were left anyway by the definitions were to be filled in the process of legal interpretation by general principles of (international) law. The continental lawyer in him was speaking when he placed that condition on his proposal to accept definitions:

³⁴⁰Speech of Mr. Teitgen at the 2nd Session of the Consultative Assembly, Collected Edition of the Travaux préparatoires, volume V, 284.

³⁴¹Collected Edition of the Travaux préparatoires, volume V, 286.

We should be prepared to accept definitions, we should grant the concession requested by the United Kingdom, but we should add - and this seems essential to me - that these definitions propounded to us shall be interpreted in the light of the general principles of law obtaining among civilised nations. If we act this way, whatever obscurities and *lacunae* may subsist in these definitions would be removed by the simple fact of this supplementary note on this interpretation.³⁴²

The legal advisers of the Ministers did not reach agreement on the majority of the proposed amendments so the ECHR was signed on November 4, 1950, substantially in the form approved by the Ministers in August.

As said, the political input determined the final shape of the draft Convention prepared by the Committee of Ministers when they met in June 1950. They adopted a compromise formula on the question of the enumeration or definition. The draft combined the two texts submitted by the experts and the result apparently corresponded more closely to the definitions of the rights and freedoms and of the limitations to which they might be subjected, although it nevertheless contained certain features of the enumeration proposed by the other alternative.³⁴³ It left undecided the issue of the right of individual petition, which was referred for decision by the Ministers themselves.

The final shape of the ECHR at the crossroads of legal and political diversity

What do we have so far? First, that the struggle between unity (in the "European" ideals) was challenged by diversity of political and legal goals shown in two schools of thought. The thinking behind these two ways of

³⁴²Collected Edition of the Travaux préparatoires, volume V, 286.

³⁴³A. H. Robertson, The Council of Europe: Its Structure, Functions and Achievements, 2nd. ed, (1961), 163.

doing things in law coincide with the assumptions that guide the legal traditions, civilian and common law. The document which eventually entered into force on September 3, 1953,³⁴⁴ was born therefore at the crossroads of the traditions.

Lastly, let us consider a few further examples of the struggle as reported by A. H. Robertson.³⁴⁵ In these examples the civil lawyers appeared again rather comfortable with generalisations but their common law colleagues showed their preference for detailed definitions, almost giving the impression that they feared any loss of their capacity to legislate for the very rare case. He wrote that at a certain point the civilians wanted to incorporate the open-ended words "Everyone has the right to life, liberty and security of person" of Article 3 of the United Nations Declaration textually in the ECHR, but the common lawyers considered that the "right to life" required a statement of the circumstances in which someone could be lawfully deprived of their life. Article 2 of the ECHR spelled out those limitations, for example, when deprivation of life "results from the use of force which is no more than absolutely necessary" in self-defence, to carry out a lawful arrest or in action to suppress a riot or insurrection. Similarly, the civilians also wanted to incorporate word-for-word the requirement that "No one shall be subjected to arbitrary arrest, detention or exile" of Article 9 of the UN Declaration. The long Article 5 ECHR defines the circumstances in which detention is lawful, following the common lawyers' proposals, and one might speculate, based on what is traditionally understood as a good drafting practice in the common law that no doubt clarified the contents of the

³⁴⁴The (substantive) rights and freedoms protected were taken from the Covenant on Civil and Political Rights of the United Nations. Part III of the Covenant approximately corresponds to Section I of the ECHR. Section IV of the ECHR spells out the powers and procedures of the European Court of Human Rights.

³⁴⁵He was a member of the Council's Secretariat at the time the discussions took place.

article. There are further examples, such as Article 6 ECHR which goes into detail to define the notion of a "fair trial", and so on. The common law influence on the ideas carried by these articles will be seen more clearly in confrontation with some civilian institutions and practices as will be addressed in Chapters 7 to 10.

It has been said in another context that whenever representatives of many countries seek to reach an agreement they may resort to some sort of artificial compromise using terms that are ambiguous, or too open, "If the parties to a proposal cannot agree, it may be necessary to fall back on putative agreement by propounding an imprecise formula to paper over the cracks."³⁴⁶ As pointed out by Mr. Robert Schuman, the French Minister, the political goal of arriving at an agreement was very important at that moment. Schuman said at the ceremony of signature that although the ECHR had imperfections it was a step in the right direction.³⁴⁷ Besides, the gaps between statute and reality which were bound to appear sooner or later would be filled in by means of legal interpretation.

For present purposes the important point is that the ECHR was produced out of a compromise of various traditions. For example, at a meeting with the British Prime Minister and the ministers most directly concerned with the ECHR issue on October 18, 1950, the Attorney-General, Sir Hartley Shawcross, reportedly observed that the lack of clarity in the Convention (so much complained of in the United Kingdom) was in reality a reflection of a compromise between the different legal systems of the countries involved.³⁴⁸

³⁴⁶F. A. R. Bennion, Bennion on Statute Law, London: Longman, 3rd. ed., (1990), 248.

³⁴⁷Charter of Freedom, op. cit.

³⁴⁸Geoffrey Marston, "The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950", (1993) 42 ICLQ 796, 819.

The condition of the ECHR as an element "alien-from-our-system" has been acknowledged by various writers. Observers from both sides of the divide between the legal traditions are unanimous in attributing this "exotic" condition to the ECHR to the influences of the "other" tradition. Paradoxical though it may seem, despite the efforts of the United Kingdom in the drafting stage the document produced was full of principled and open ended articles. So open-ended in fact that Francis G. Jacobs, writing in 1987, explained that the vagueness of the document made the English bench find its drafting style "unfamiliar" despite the common law influences on it. He asserted that "there is the unfamiliar style of drafting: in contrast with the tightly drawn style of domestic legislation, the provisions of the Convention - although they often distil established principles of English law - are regarded as vague and insufficiently precise."³⁴⁹ (Conversely, from a civil lawyer standpoint the detailed nature of statutes in common law jurisdictions may appear as prolixity.³⁵⁰) It has been said that Lord Jowitt, the Lord Chancellor when the ECHR was being drafted, was very critical of the lack of precision in the document and also, of the fact that cases arising out the ECHR would be heard by a court where judges coming from various different systems of law would sit behind closed doors.³⁵¹ All of that was certainly unfamiliar for a common lawyer. At the other side of the divide, things were not much different. For example in Austria, there were also complaints concerning the "unfamiliarity" of the text, but this time the criticism was based on too much common law influence. Shortly after ratification, Austria experienced the consequences of its legal system not being

³⁴⁹Francis G. Jacobs, "The Convention and the English judge" in: F. Matscher and H. Petzold (eds.), Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda, (1988), 274.

³⁵⁰Ugo Mattei, Common Law; Il diritto anglo-americano, (1992), 254.

³⁵¹Geoffrey Marston, *op. cit.*, 818.

fully in line with the Convention, so it has been reported that the general opinion in the 1970s was that "tried and tested Austrian legal institutions should not be exchanged for the unfamiliar, relatively vague principles - often based on Anglo-American legal thinking - of the Convention."³⁵² Viewed from another civilian country, the ECHR's common law influences become more noticeable, as they speak of the (slow) penetration of common law notions into the Italian (civilian) legal order by means of the ECHR: "Speedy trial, the right to confrontation, and the abolition of the investigating magistrate, are reforms of procedural policy drawn from the Convention on Human Rights, which today plays the role of a "cultural bridge" between common law and continental criminal justice systems."³⁵³ These comments are a measure of the mix of the traditions that took place in the document which also acts *per se* as a vehicle for the infiltration of legal thinking from "other" traditions into one's own. It is, therefore, the "mix" of traditions what makes the ECHR be perceived as "alien" despite the fact that the document was not an elaboration created in solitude, since it includes approaches and notions extracted "bottom-up" from the traditions of the member states. This "mix" quality in the document itself is echoed in the outcome of the process of decision making in Strasbourg. In this dissertation, the influences of the legal traditions on the "yardstick", the ECHR, will be made visible in their confrontation with the behaviour and practices of the member states. The analysis of the European *jurisprudence* will show the clashes and how the ECHR fares in these encounters. This topic is addressed in Chapters 7 to 10.

³⁵²Andreas A. Khol, "Influence of the Human Rights Convention on Austrian Law", (1970) 18 AJCL 237, 241.

³⁵³Ennio Amodio, "L'attività del Consiglio d'Europa e il processo penale italiano" in: Mauro Cappelletti and Alessandro Pizzorusso (eds.), L'influenza del diritto europeo sul diritto italiano, (1982), 579 and 582. (quoted from English summary at page 706)

Over and above, on the "alien" nature of the ECHR, F. Mount appropriately asked, "Might not the differences and difficulties dwindle with the years, as the law fills out with case law and statute law?", and his answer, thinking of the situation in the United Kingdom, but which could be extended, however, to the rest of the member states: "It may have been only in the early years of the European Convention's operation that it appeared so foreign, so hopelessly alien to our own conceptions of how the law protects our liberties."³⁵⁴ He highlights another issue: the ECHR as a bridge between the traditions in the field of human rights and its expansion. It is a fair bet that when the Convention was signed, and in spite of the "European" rhetoric, none of the Ministers of the member states expected the system to develop into what it is today. It has been pointed out that, perhaps in spite of those not in favour of deeper European unity the the "strong" Europeans aimed the system in the direction of their policy anyway.³⁵⁵ What ECJ Judge David Edward³⁵⁶ wrote concerning the United Kingdom may well apply all over the member states:

These institutions were not intended by Britain to have the effect they have had. The idea of those who wrote the European Convention on Human Rights - principally an official in the Home Office - was that they were writing down liberties of the British people as guaranteed by the Common Law. The intended targets were Hitler and Milosevic, rather than the Home Office, but that is not quite how it has turned out!³⁵⁷

Whatever the case and whatever the role of the political compromise arrived at, it appears that the ECHR is an open-ended document and that even if the "definition theory" was followed, it fell short of the expectations of

³⁵⁴Ferdinand Mount, The British Constitution Now: Recovery or Decline?, (1993), 231.

³⁵⁵Arnold J. Zurcher, *op. cit.*, 49.

³⁵⁶Judge at the ECJ.

³⁵⁷David Edward, "Nations, states, people and commerce", in: Geraldine Prince (ed.), A Window on Europe: The Lothian European Lectures 1992, (1993), 54.

the early 1950s. It will be discussed in Chapter 6 that constitutional interpretation (as is carried out in Canada or the United States) appears to be the most appropriate way of construing the open-ended clauses of the Convention and its Protocols.

Conclusions

The discussion carried out in this chapter indicates that the legal traditions, among other influences, had an impact on the final product: the ECHR. The member states differ in their institutional structure, legal culture, legal education and training, and even as regards the conceptual frameworks which they tend to favour to discuss matters and these elements had their share of impact on the final shape of the ECHR. To assess this influence one option is to study the ECHR article by article in light of diplomatic documents, drafts and interventions of the participants. In this dissertation, another alternative is followed, which is to look at the impact of the underpinnings of the ECHR in their confrontation (and how they end up as a result) with practices and legal institutions of the member states.

The aim of this chapter has also been to show that these influences on the ECHR were "bottom-up" and that they appeared as a gulf between the "enumeration theory" supported by the civilians and the "definition theory" favoured by the common lawyers. It was also admitted that these fault-lines between the delegates could have also been hiding their motives for opposing what other delegates were supporting but done so in more diplomatic (and respectable) terms. In addition, there were other disagreements concerning whether a Court should be created, whether the right of individual petition should be granted, whether the ECHR was to be extended to

colonial territories and so on³⁵⁸ but those were not included in this discussion because the confrontation "definition" versus "enumeration" was deemed more fruitful from the point of view of the encounter of the legal traditions: they reveal the way legal thinking and reasoning is carried out in the different systems.

The tension which appeared in the drafting emerges in different guises in the rest of the chapters, such as, for example, the one "transplanted" ECHR being modified by the diversity of "soils" to which it has infiltrated, or the tendency towards one or several systems of protection of human rights for Europe that pervades the decision making process of the Court (and also the Commission). There is therefore a parallel between the attitudes of the delegates and those of the judges sitting in the European Court for the reason that whenever there is a coming together of lawyers and judges from different legal systems - perhaps because legal training is so much jurisdiction-based - tensions and pressures arise when they are reluctant to leave hold of their usual way of thinking in legal matters. Civilians point to the "unfamiliar" common law influence and the common lawyers to the opposite aspect. Its articles are open-ended despite the influence of the "definition" theory and as any bill of rights, it requires appropriate techniques of interpretation.

The other conclusion is that the ECHR as a compromise was also a harbinger of the (other) compromises "convenient to everybody"³⁵⁹ that the European Court strives to reach in its own adjudication process. Another observation is also very clear. By reading the reports one receives the impression that in the negotiations the United Kingdom

³⁵⁸See, on these issues: A. H. Robertson, *op. cit.*, (1961), 165-7.

³⁵⁹The existence of "des compromis qui conviennent à tout le monde" was put to me by a judge of the European Court in private conversation.

enjoyed a considerable political and diplomatic "pull" vis-a-vis its Continental friends. Perhaps the reason was victory in the war and that the "special relationship" with the United States was at a high point to the extent of giving the United Kingdom a diplomatic "punch" beyond its weight, although this is for political scientists to determine.

Diversity and its effects were acknowledged by the countries' representatives, and it was in the lengthy discussions that the multiplicity of approaches to the protection of human rights in Europe appeared, in turn, a source of richness and inspiration and also, of strain. All the above therefore goes to show that the ECHR was born at a crossroads and, as it will be seen, it is applied at a crossroads to produce an outcome, its *jurisprudence* which is also at a crossroads of the traditions.

Decision-making and interpretation in Strasbourg: the procedure

Comparative analysis of the procedure in Strasbourg

Introduction

The human rights judicial function of the European organs is carried out through a particular Strasbourg procedure within the framework of the ECHR and which is therefore (mainly) statutorily described. The Rules of Procedure of the European Commission of Human Rights (hereafter Rules of Procedure)³⁶⁰ and the Rules of Court³⁶¹ contain relevant rules and additionally, the case law of the Court and Commission has become a source where (procedural) rules are further spelled out.³⁶²

Therefore, the purpose of this chapter will be to establish (a) the extent to which civilian elements have been adopted by the Strasbourg Court procedure and (b) the important (procedural) points of similarity and difference between Strasbourg and the legal traditions of the member states. The comparative method adopted will

³⁶⁰Text as of October 1, 1990.

³⁶¹Text as of April 20, 1992. Relevant for this stage is: Paul Mahoney, "Developments in the Procedure of the European Court of Human Rights: the Revised Rules of Court", (1983) 3 YEL 27.

³⁶²This work takes into account the machinery as it is today. This is the mechanism which has handled the cases discussed in this dissertation. Protocol 11 was signed by all the Foreign Ministers of the Council of Europe on May 11, 1994, and it will enter in force a year after the process of ratification by the High Contracting Parties to the ECHR is completed.

rely on four "signposts" to highlight the influences of the traditions, as follows: that the procedure consists of stages, that it leans towards an inquisitorial style, that it could be described as "*contradictoire*" and that it favours written over oral exchanges.³⁶³ Some exercise of choice in this selection could not be avoided.

The system of protection of the Council of Europe is a supranational forum which brings together the legal orders of the member states in a complex dialectic relationship of mutual "transplants" and "borrowings" which break the "isolation" from one another.

Nonetheless, a question remains. Can the Strasbourg machinery and its procedure (operating as a whole and identifiable system of law for the application of the ECHR) take on the task of becoming a single system of protection of human rights in Europe?

The procedure in Strasbourg:

The procedure at Strasbourg consists of a series of successive steps designed to find out whether there has been a breach of the Convention. It is fashioned in a way analogous to public (administrative) law procedures in a civilian jurisdiction. "The Commission of Human Rights of the Council of Europe has adopted many of the practices of the French *droit administratif*"³⁶⁴ which are observable in, among other characteristics, its rather inquisitorial and fact-finding methods. Similarly, the

³⁶³The selection was based on the descriptions of the procedure carried out by continental writers such as: François Monconduit, La Commission européenne des droits de l'homme, (1965), Giorgio Lodigiani, La Commissione nella Convenzione europea dei diritti dell'uomo, (1969) and concerning the Court, Gérard Cohen-Jonathan, La Convention européenne des droits de l'homme, (1989).

³⁶⁴W. Paul Gormley, "The Significant Role of French Administrative Jurisprudence as Presently Applied by the Court of the European Communities, with Emphasis on the Administrative Law Remedies Available to Private Litigants", (1963) 8 South Dakota Law Review 32, 62.

Court tends to seek the truth rather than to function as an umpire in a contest between prosecution and defence.

The phases of the procedure:

The procedure consists of stages

Although the procedures of any court tend to be organised in stages, those in Strasbourg bear resemblance to their counterparts in the litigious procedure before the French Council of State. The *contentieux administratif* in France can be divided in the following steps: the initiation of the proceedings, the "instruction", the judgment and the execution.³⁶⁵ In Strasbourg, the first two steps are the resolution of the issue of admissibility (which parallels the initiation of the proceedings) and the work of the Commission on the merit (which parallels the instructory phase). The other two stages are the examination of the case by the deciding organ (Court or Committee of Ministers) in order to issue a judgment (a stage which parallels the trial phase in a Civilian administrative - or criminal - trial), and finally, the execution of the decision. The first action is the individual or state complaint made to the European Commission.³⁶⁶ In the case of an individual complaint, a

³⁶⁵For further details on this division in stages of the French administrative procedure see L. Neville Brown and J. F. Garner, French Administrative Law, (1983), 58.

³⁶⁶Individual complaints normally arrive at the central post office of the Council of Europe and from there they are forwarded to the Secretariat of the Commission for screening. Those letters are the first contact with the Commission's Secretariat and they are not officially registered immediately. The Secretariat opens a provisional file and sends the applicant a form to fill out, although applicants can submit other documents in addition or instead of this form. P. van Dijk and G.J.H. van Hoof criticised that for the layman who receives an answer from the Commission's Secretariat it may be impossible to infer from the standard letters whether they contain "information" from the Secretariat and not an actual decision of the Commission. In their opinion, therefore, such practice should be changed. (See P. van Dijk and G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, (1990) 2nd. ed., 62) On the other hand, E. Fribergh, "The Commission Secretariat's Handling of Provisional Files", in: Protecting Human Rights: The European Dimension, Studies in Honour of Gérard Wiarda, op. cit., points out in pages 185 and 186 that the answers are carefully drafted so as not to mislead the applicant into believing that the

provisional file³⁶⁷ is opened only if the applicant's letter discloses a grievance.³⁶⁸ A pronouncement of inadmissibility by the European Commission³⁶⁹ ends the case as a final judicial decision³⁷⁰ in view of the absence of appeals to the European Court or any other body against that decree.³⁷¹

In the admissibility stage the supranational Strasbourg machinery, in common with other international tribunals, examines whether all (relevant) domestic remedies have been exhausted. The European Court has explained that this phase "[...] dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own

Commission has decided the case. To avoid errors, he wrote, the Secretariat routinely circulates the letters among all lawyers (however, it appears from Mr. Fribergh's article that the language of the letter seems to be a limitation in the number of lawyers that can do this, although one may wonder whether it would be possible to resort to translations), and newly appointed lawyers are not entrusted with this screening task until they have completed a period of training. See also: Ralph Beddard, Human Rights and Europe: a study of the machinery of Human Rights, (1973).

³⁶⁷A provisional file is different from a registered application. Laurids Mikaelsen, European Protection of Human Rights: The Practice and Procedure of the European Commission of Human Rights on the Admissibility of Applications from Individuals and States, (1980) at 39, explains that provisional files are a sort of journal to enter not formally registered cases, which, at a later stage may or may not be registered. The opening of a provisional file is left to the discretion of the Secretary (of the Commission's Secretariat) who is answering the request, under Rule 13.

³⁶⁸According to Rule 13 (b) of the Rules of Procedure of the Commission, all communications should go through the Secretary of the Commission Secretariat, who "shall be the channel for all communications concerning the Commission". This Secretary is authorised under Rule 30 (4) to correspond with applicants in languages other than French or English, the official ones. To simplify access to the Commission, all communications and their supporting documents are accepted in any language of the member states, and the answers to the applicants are given in the language they used in their letters to the Commission.

³⁶⁹There is one member to the Commission for every state which has ratified the ECHR, and no distinctions are made between countries which have granted the right of individual petition or not. Roger Kerridge, "Incorporation of the European Convention on Human Rights into United Kingdom Domestic Law", The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights, M. P. Furnston et al. (1983), at 268 pointed out that it may seem unfair that a member of the Commission from a country that has not recognised the right to individual petition could hear a case against another member state when an individual application is brought against a country that has recognised the right of individual petition.

³⁷⁰Laurids Mikaelsen, op. cit., 15.

³⁷¹It should be said that only a proportion of cases are ruled admissible so as to enter the post-admissibility stage of the proceedings.

legal system [...]”³⁷² For this reason both private and inter-state applicants must comply with the requirement laid down in Article 26 ECHR.³⁷³ If it appears that the petitioner has not exhausted all available domestic remedies, the Commission has the power to reject the case summarily.

In line with the international law on the subject, the Commission’s and Court’s case-law reveal that non-effective or unduly prolonged domestic remedies need not be exhausted. Likewise, a complainant’s failure to resort to a domestic remedy because any attempt to do so has been persistently unsuccessful in the past will not result in the automatic rejection of the application. This is true even if the national courts reverse themselves while the case is before the Commission, provided that the case has reached the Commission before the change in the national case law,³⁷⁴ although a reasonable effort to exhaust potential remedies must be made.

Article 26 ECHR also contains what has been termed the six-month rule. This rule requires that the application be filed with the Commission “within a period of six months from the date on which the final decision was taken.” The rule is similar to a statute of limitations and it makes the supranational remedy unavailable if a complaint has not been filed within a reasonable time. “Final decision” means the last domestic remedy to be exhausted pursuant to Article 26.

³⁷²*De Wilde, Ooms and Versyp* case, (1981) 4 EHRR 1.

³⁷³In addition, Article 27 (3) ECHR provides that, “the Commission shall reject any petition referred to it which it considers inadmissible under Article 26.” The latter spells out the requirement of the exhaustion of domestic remedies. We should note that the grounds of inadmissibility set out in Articles 27 (1) and 27 (2) apply only to private petitions filed under Article 25 of the ECHR.

³⁷⁴*Vagrancy* case, (1979-80) 1 EHRR 373.

If the case is declared admissible, it then moves on to the next stage, which could be termed the "*instruction*". In this examining phase, the Commission works in some measure as a commission of inquiry in order to establish the facts of the case. The Commission, fulfilling a political rather than a judicial role,³⁷⁵ will then attempt to reach a friendly settlement between the applicant and the respondent government; if the settlement is reached, that marks the end of the case.³⁷⁶ Otherwise the case moves to another stage where the Commission will issue a non-binding Report.³⁷⁷ The document is nevertheless usually viewed as an extremely important source of information and as a rule, it becomes the basis of the examination. Incidentally, Article 29 ECHR authorises the Commission to declare an application inadmissible if it is later found not to satisfy all the requirements of the ECHR even though it has been declared *prima facie* admissible.

Once the "*instruction*" stage is finished, the Report³⁷⁸ with the Commission's findings is transmitted to the Committee of Ministers, together with any proposals the Commission wishes to propound. The European Court has determined that it has to be "seized of a case" (*être saisi d'une affaire*) by the member states³⁷⁹ or the

³⁷⁵F. E. Dowrick, "Juristic Activity in the Council of Europe; 25th year", (1974) 23 ICQL 610, 618.

³⁷⁶Article 28 (b) ECHR.

³⁷⁷Under Article 31 ECHR the Commission is required to "draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention"

³⁷⁸Since the entry into force of Protocol 3 in 1970 the application is examined by one or more rapporteurs appointed by the Commission from one of its members, as required by the provisions of the Rule 47 of the Rules of Procedure. Under Article 25 of the ECHR the rapporteur may decide to invite the parties to submit further written evidence or observations, answer questions or give explanations. Under Rule 54 (3) (b) the rapporteur must draft a report for the Commission in accordance with Rule 57 (in case a friendly settlement has been reached), Rule 60 (when there is no friendly settlement), or Rule 62 (when a case that has been accepted is struck off the list).

³⁷⁹When a state has brought the case before the court, the name and the address of the person whom the state has appointed as its agent within the meaning of Rule 28 of the Rules of Court must also be mentioned as required by Rule 32 (1) of the Rules of Court. This agent may be assisted by advocates or advisers.

Commission³⁸⁰ as required by Article 47 ECHR within the period of three months provided for in Article 32 ECHR. In three cases dealing with delays in civil proceedings in Italy, *Istituto di Vigilanza*³⁸¹, *Figus Milone*³⁸² and *Goisis*,³⁸³ the Court found that it could not go into the merits because the Commission's requests to bring the cases before the Court had been made out of time. The Court said, therefore, that:

[...] In order to seise a court, it is not sufficient to decide to seise it. The decision must be implemented. [...] That being so, the finding is inescapable that the Commission exceeded - albeit by only one day - the time allowed it. Furthermore, no special circumstance of a nature to suspend the running of time or justify its starting to run afresh is apparent from the file.³⁸⁴

A copy of the request or the application is transmitted to the members of the Court and to each of the States mentioned in Article 48 ECHR³⁸⁵ in so far as they themselves have not submitted the case to the Court.³⁸⁶ If the Court is not seized of the case, the Committee of Ministers will then decide "whether there has been a violation of the Convention."³⁸⁷

³⁸⁰The Commission delegates one or more of its members to take part in the consideration of the case before the Court; they may be assisted by other persons (Rule 29 (1) of the Rules of Court). The delegates are appointed by the Commission in a plenary session. Under Rule 63 (1) of the Rules of Procedure, they represent the whole Commission and shall act in accordance with such directives as they may receive from it.

³⁸¹(42/1992/387/465)

³⁸²(43/1992/388/466)

³⁸³(46/1992/391/469)

³⁸⁴The Court used the same text in all three cases. See cases (42/1992/387/465) and (43/1992/388/466) at para. 14, or case (46/1992/391/469) at para. 19.

³⁸⁵Article 48 ECHR lists the following as authorised to bring a case before the Court: the Commission, a High Contracting Party whose national is alleged to be a victim, a High Contracting Party which referred the case to the Commission or a High Contracting Party against which the complaint has been lodged.

³⁸⁶Furthermore, Rule 32 (1) of the Rules of Court sets down that the respondent government be invited to supply the Registrar with the name and address of its agent. Other governments that may participate are requested to inform the Registrar within two weeks whether they will appear as parties. When it is not the Commission who brought the case before the Court its members also receive a copy of the application.

³⁸⁷Article 32 (1) ECHR. P. van Dijk and G.J.H. van Hoof, op. cit., 102, argue that the responsibility to make this decision was given to the Committee of Ministers because in the 1950s, when the ECHR was being drafted, it was assumed that only a few states would

The Report of the Commission may contain concurring and dissenting opinions and is drafted in the form of a judicial opinion, but it is not a judgment, because the Commission - as an investigative judge in a civilian jurisdiction - lacks the power to adjudicate on the case. Only the Committee of Ministers or the Court can issue decisions binding on the parties.

The final step concerns decision-making. This stage resembles in some measure the trial phase in administrative or criminal proceedings in a civilian country. Such examination is mainly conducted on the basis of the Commission's Report despite its non-binding nature.

In Strasbourg there is no consolidated trial within the meaning of the term in common law jurisdictions; rather, the successive steps of the judicial proceedings are accomplished within a period of time, as is the tendency in civilian nations. The comparative point is that this type of procedure is quite unlike the pattern of the procedure in the common law world, where the ideal is to concentrate as many procedural steps in one hearing as possible.

If the examination of the case takes place before the Court,³⁸⁸ the proceedings take place before a Chamber of 9

accept the jurisdiction of the Court and that more states would be willing to ratify the treaty if the power to make a final decision on breaches of the ECHR was given to their political equals.

³⁸⁸Under the Rule 32 of the Rules of Court, the request or application is written, and must contain the following data: the parties to the proceedings before the Commission; the date on which the report was transmitted to the Committee of Ministers; the object of the request or the application. An application must be signed by the applicant or the applicant's representative. The complaint must not be the same as one already examined by the Commission or previously filed at another international body, and it must be within the range of the ECHR. By means of these data the Court is able to determine whether all the provisions for the filing of an application or a request met the requirements of ECHR. The Commission has prepared a special form to make it easier for the plaintiff to submit a proper application.

judges.³⁸⁹ After the request or the application has been filed and the constitution of a Chamber has taken place, its composition is disclosed to the judges, agents of the parties and the President of the Commission. Then the examination of the case at the trial stage may start³⁹⁰ and the judgment of the Court will be sent to the Committee of Ministers to supervise its implementation, a stage which approximates the "execution" phase in the French or other continental administrative proceedings. The judgment of the Court is law only for the party to the case, therefore, the decisions of the Court - despite the fact that the principles established are as a rule followed in successive decisions - are not formally binding precedents (*stare decisis*) for the States Parties in general.³⁹¹

The procedure leans towards an inquisitorial style

Unlike the common law preference for "accusatory" criminal proceedings and "adversary" civil trials, both French administrative and criminal procedures³⁹² (although not civil procedure) as well as the Strasbourg procedure tend to be "inquisitorial". Similarly, not only may the European Commission or Court take upon themselves the task of finding the facts if they are not content with the facts as established by the parties, but in general they approach the issues of the case as a commission of inquiry.

³⁸⁹Rule 21 of the Rules of Court.

³⁹⁰It should be said that the Court can order interim measures to the parties although it cannot enforce them (the ECHR nowhere confers the right to order interim measures). The same applies to any interim measures taken by the Commission. In fact, it would appear to be a prerogative of the Commission rather than on the Court to recommend interim measures if only for the Commission's involvement at a much earlier stage, when the chances that an imminent damage may be prevented or limited are higher. When the Court has ultimately been seized of the case, even more time has elapsed since the facts concerned have taken place. Those interim measures may be requested by a party, the Commission, or any other person concerned.

³⁹¹Thomas Buergenthal, International Human Rights in a Nutshell, (1988), 112.

³⁹²L. Neville Brown and J. F. Garner, *op. cit.*, 58.

The underlying assumption appears to be that the European organs are not satisfied with merely providing a forum for the parties to battle out their differences. The Commission, for example, "may *proprio motu* or at the request of a party, take any action which it considers expedient or necessary for the proper performance of its duties under the Convention".³⁹³ The individual applicants, after the initiation of the case, may find themselves displaced in some measure, since the Commission takes over the burden of activating the proceedings. Once the Commission issues its Report, the power of initiative rests in its hands or in those of the member states.³⁹⁴ Although the individuals who filed an action against a member state exercise their own right, it is understood that the outcome of their complaints has an incidence on the European public order.³⁹⁵ The need to protect this public order goes beyond the actual case and can justify in part an inquisitorial "search for the truth". There is also a parallel between this investigative approach and the footings of a Council of State-type of court. The French Council of State, for example, was established to allow an individual who had a dispute against the administration to resort on appeal to a body other than the actual agency who made the decision in the first place. (The latter was the interested party defendant.) Likewise, and although this does not necessarily reflect negatively on the impartiality of any national judiciary, citizens who had a Convention-based dispute could take their cases to a supranational court beyond the system of courts of the respondent government. The idea that individuals could seek redress against their own governments before a special system of courts seems therefore to have percolated through to the

³⁹³Rule 34 of the Rules of Procedure of the European Commission.

³⁹⁴Rolv Ryssdal, "The European Court of Human Rights and Gérard Wiarda, *op. cit.*, 1.

³⁹⁵François Monconduit, La Commission européenne des droits de l'homme, (1965).

international level in Strasbourg from the (national) French doctrine of the separation of powers, particularly one of its consequences, the distrust of the ordinary system of law courts to handle disputes against the government. In this respect, and despite the influences of the International Court of Justice, it has been said that the Strasbourg system works as an administrative tribunal because both the Court and the Commission function "as an international administrative court."³⁹⁶ As it was the case of the French Council of State or the ECJ, the existence of the Strasbourg system and its supranational yardstick set aside the idea of the immunity of the state from legal proceedings.³⁹⁷ The idea of the protection of the individual vis-a-vis the powers of the administration imbued in the Council of State was borrowed by the ECJ. This is an observation which applies equally well to the Strasbourg system:

Specifically, the Community Court's power, functions, jurisdiction, and procedure will always bear a striking resemblance to that of the Conseil d'Etat for the reason that both tribunals are striving for similar goals, namely the protection of the individual citizen against the arbitrary action of the executive organs of government.³⁹⁸

As said, the Commission subjects all the pleas to a preliminary examination bearing on their admissibility, which includes a determination of whether domestic remedies have been exhausted. If the application is declared admissible, the Commission's next responsibility is to examine the facts. These activities are inquisitorial in style as the Commission will not act as a detached arbitrator. If need arises it is authorised to carry out an on-the-spot investigation as an investigative judge, directing the procedures, rather

³⁹⁶W. Paul Gormley, *op. cit.*, 53.

³⁹⁷W. Paul Gormley, *op. cit.*, 60.

³⁹⁸W. Paul Gormley, *op. cit.*, 77.

than leaving to the parties the task to present their case to the judge.³⁹⁹ Normally, though, the parties are invited to make written observations and subsequently to submit oral arguments at one or more hearings.

Article 28 (a) ECHR provides us with another example of the powers of the Commission to conduct an inquiry and examine the case, as it authorises the Commission to hold hearings, receive written submissions, examine witnesses both at its seat in Strasbourg and, if necessary, by interviewing them in prisons or elsewhere. The Commission may put questions to the agents, legal advisers or representatives of the parties. Paradoxical though it may seem, the power to perform *ex officio* examinations is not expressly given to the Commission by the ECHR or its Rules of Procedure, but as early as 1958 the Commission declared that by virtue of its office it could, for example, carry out tasks to

[...] find out whether, in the submitted case, there appears to be a breach of the Convention or not; the Commission will conduct this investigation *ex officio* to determine whether the object of the complaint falls, by its own nature, on the field of application of the Convention, without the requirement for the applicant to point out a specific article of the Convention.⁴⁰⁰

Article 33 ECHR (and also, Rule 17 of the Rules of Procedure) further advances the enquiring features of the organ, because it sets down that "The Commission shall meet *in camera*." Unlike the civilian tradition,⁴⁰¹ the common law objects to closed hearings and emphasises the exemplary role of justice in society, which must be seen to be done. Whatever the case, it may be conceded that the secrecy may help to pull off a friendly settlement,

³⁹⁹For example, in the Greek case.

⁴⁰⁰application # 202/56, in: (1955-1956-1975) 1 YECHR 192.

⁴⁰¹Louis-Edmond Pettiti, "La Commission et la Cour européenne des droits de l'homme", Les droits de l'homme et la nouvelle architecture de l'Europe, Mario Bettati et al. (eds) (1991), 38.

perhaps because government officials may feel more free to voice their views.⁴⁰²

In addition, another active role of the Commission is to take the (discretionary) decision whether or not to refer a case to the Court. Neither the Court can choose its cases nor the individual petitioners can compel submissions. The current practice of the Commission suggests that it tends to refer cases where it has found a violation of the ECHR, or which raise important legal issues or where there is a significant divergence of view in the Commission regarding their outcome. If none of these conditions is present, the Commission will most often allow the Committee of Ministers to pass a decision.

Another telling argument in support of the view of the Commission as an inquisitorial organ is that, once it has defined the issues of the case in a Report, it then turns into a sort of A-G before the Court (although in the system as it stands there is no A-G as in the ECJ). As "an independent and advisory organ with respect to the questions of fact and of law concerning a case before the Court,"⁴⁰³ it does not take sides against the respondent government, rather "before the Court, it becomes an assistant, an *"amicus curiae"*, whose tasks partially resemble those of an Advocate-General."⁴⁰⁴ Now, an intriguing observation can be made if its "Advocate-General" role is put side by side with the requirements of the ECHR as interpreted by the European Court in the *Borgers* case.⁴⁰⁵ As will be discussed in Chapter 9, the

⁴⁰²Henry G. Schermers, The European Commission of Human Rights from the Inside: Some Thoughts on Human Rights in Western Europe, (1990), 13.

⁴⁰³van Dijk and van Hoof, *op. cit.*, (1984) 137.

⁴⁰⁴Hans Christian Krüger, "Le mecanisme de protection de la convention européenne des droits de l'homme", in Mady Schaffer (ed.) L'avocat et l'Europe des 12 et des 21: la defense des droits de l'homme' l'integration communautaire perspectives 1992, (1988), 37.

⁴⁰⁵(1993) 15 EHRR 92.

Court found the office of the Belgian *Avocat Général* (who arguably acts as an independent adviser to the court making recommendations as to the outcome to the case) not to satisfy the (common law inspired) criteria of procedural fairness and equality of arms laid down in Article 6 ECHR. It may be questionable, therefore, whether the addition of functions comparable to a degree to those of an "Advocate-General" to the Commission, fully complies with the guidelines of Article 6 ECHR since the Commission was the organ who did the "*instruction*" of the case.

Likewise, there are inquisitorial underpinnings in the procedure before the Court. A Chamber of the Court may procure itself information in different ways. For example, it can order *ex proprio motu* the appearances of witnesses, experts, or any persons in another standing whose evidence or statements seem likely to be of assistance, at the request of one of the parties, the delegates of the Commission, the original applicant or a third party (who had been either invited or granted leave to submit written comments).⁴⁰⁶ A passage in the *Lawless* case⁴⁰⁷ serves to illustrate the way the Court understands its powers of examination since its early years, when it said that,

[...] the Court may also hear the Applicant in accordance with Rule 38 of the Rules of Court, and, as part of the enquiry, may invite the Commission, *ex officio*, or authorise the Commission at its request, to submit the Applicant's observations on the Report or on any specific point arising in the course of the debates; [...]

⁴⁰⁶Rule 41 (1) of the Rules of Court.

⁴⁰⁷*Lawless case*, European Court of Human Rights, Preliminary objections and questions of procedure, in: (1960) 3 Yearbook 492, 516. When the Court is acting of its own accord, such persons are summoned by the Registrar. The member states are expected to lend the Court assistance to make communications, notifications or summonses addressed to persons in their territory other than the agents of the parties. The responsibility has been inferred from the spirit of the ECHR.

Both the Commission and the Court enjoy a degree of discretion to apply their rules in a flexible way.⁴⁰⁸

Rather like a civilian trial judge, the President of the Chamber directs the oral hearings.⁴⁰⁹ For example, the President of the Chamber of the Court orders whether, and if so when, memorials and other documents are to be filed.⁴¹⁰ Until the expiry of the time-limit the parties may file preliminary objections. The Chamber gives its decision on such objections after receipt of the replies or comments of every other party and of the delegates of the Commission, or joins the objections to the merits.⁴¹¹

The Strasbourg procedure as a whole appears to be guided by a substantive law idea known in (for example) French administrative law as the principle of legality, which determines that the administration incur in liability if it fails to act both in form and motive in accordance with the law. When a complaint is raised against the administration, the litigious section of the Council of State will normally request the file of the case to check whether a decision was made in accordance with the legal fiction that presumes that the administration (or, in our case, the governments of the member states of the Strasbourg system) acts *bona fide* and takes decisions following the conception of the supremacy of law, that is, whether the principle of *légalité* was respected. It has been said that this principle is wider than the *ultra vires* doctrine in English law:

⁴⁰⁸Rule 26 and 27 of the Rules of Court. The Title in the Rules of Court dealing with the procedure opens with the general principle that for the consideration of a particular case the Court may derogate from some of the rules with the agreement of the parties and after having obtained the opinion of the delegates of the Commission. In the provision relating to the use of the official languages before the Court the possibility of derogation is mentioned again.

⁴⁰⁹Rule 39 of the Rules of Court. The President of the Chamber also prescribes the order in which the agents, the advocates or advisers of the parties, the delegates of the Commission, any other persons assisting the delegates and the original applicant shall be called upon to speak.

⁴¹⁰Rule 37 of the Rules of Court.

⁴¹¹Rule 48 of the Rules of Court.

This is something much more than the English doctrine of *ultra vires*, there being no question of a mere observance with statutory limitations, and it also goes further than observance of the principles of natural justice; but both these ideas, so familiar to the English administrative lawyer, can be detected as constituents of the principle of the *légalité*.⁴¹²

The notion that the administration is unlike a private party is unknown in the common law tradition. In contrast, a single, but striking example where the continental assumption of "*légalité*" and the idea that the government is different from individuals can be seen in operation at the European level in the way the European Court handled the case *Artico v. Italy*.⁴¹³ In this case the Court found a breach of Article 6 (3) (c) ECHR in the failures of the Italian government in making effective the applicant's right to legal assistance. The Strasbourg organs tackled the issues in a manner comparable to a Council of State. They assumed that the respondent government takes decisions guided by the principle of legality and therefore, as the Council of State would do in similar circumstances vis-a-vis the administration, they requested to see the file of the case to check on the "*légalité*". This proved impossible. The difficulty was that the Commission had to rely mainly on the applicant's assertions and the documents he produced because:

when the Commission had asked the Government for certain details about the course of the 1972 and 1973 proceedings before the Court of Cassation, the reply had been that the registry of that Court could not supply them because, after the applications to quash had been declared inadmissible, the files had been returned to the courts from which they originated.⁴¹⁴

⁴¹²L. Neville Brown and J. F. Garner, *op. cit.*, 132.

⁴¹³(1982) 3 EHRR 1.

⁴¹⁴(1982) 3 EHRR 1, para. 29.

The Italian government adduced the impossibility of making over the applicant's file and sought the dismissal of Mr. Artico's *prima facie* evidence on grounds of its insufficiency and that the burden of proof lay upon him. The European Court responded as a Council of State would have done. The failure by the national authorities to produce the file was taken as silence, and the silence of the administration worked against the respondent government (as it would have happened in a civilian legal system), therefore, the European Court took the allegations against the government as established.⁴¹⁵ At any rate, the operation of the presumption of legality made the European Court avoid an entirely new "instruction" of the case. This would have represented a waste which the Court would have probably not been able to afford particularly in view of the growing backlog of applications and its limited resources. The fact that a new "instruction" of the case was avoided was not an indication, however, that the Court was giving up on the (inquisitorial) ambition to discover the truth as it was made plain when the government was reminded of its duty to collaborate "with the Convention institutions in arriving at the truth". In addition, in *Artico*, the European Court reiterated an explanation concerning its inquisitorial powers already put forward in *Ireland v. the United Kingdom* to the effect that, if need arises, the Court can seek material *ex proprio motu*:

The Court refers on this point to its judgment in *Ireland v. the United Kingdom*: 'In the cases referred to it, the Court examines all the material before it, whether originating from the Commission,

⁴¹⁵Incidentally, an observation made in this case, that "the Court refuses to believe that the administrative or practical difficulties relied on by the Government are insurmountable in a modern society" (at para. 30) led an Italian commentator to write (tongue-in-cheek) that: "It is really comforting to see that the Court did not believe in the existence of such organisational failures in a basic public service as the Italian Government was trying so hard to demonstrate!" (Tullio Scovazi, "Le prime esperienze dell'Italia davanti alla Corte Europea dei Diritti dell'uomo", (1984) 20 *Rivista di diritto internazionale privato e processuale* 37, 46.)

the Parties or other sources'; if necessary, the Court 'obtains material *proprio motu*' and 'will not rely on the concept that the burden of the proof is borne by one or other of the two Governments concerned'. *Mutatis mutandis*, these remarks apply just as much or even more to a case deriving from an application made pursuant to Article 25, since neither the individual applicant nor the Commission has the status of party before the Court.⁴¹⁶

Such an unambiguous statement, together with the issues discussed so far, highlights the inquisitorial footing of the Court's spirit and this is in plain contrast with, for example, the good description of the adversarial procedure supplied by Lord Justice Clerk Thomson in the Scottish civil case *Thomson v. Glasgow Corporation*:

Our system of administering justice in civil affairs proceeds on the footing that each side, working at arm's length, selects its own evidence [...] It is on the basis of two carefully selected versions that the judge is finally called upon to adjudicate. He cannot make investigations on its own behalf; he cannot call witnesses; his undoubted right to question witnesses who are put in the box has to be exercised with caution; he is at the mercy of the contending sides whose whole object is not to discover truth but to get his judgment. That judgment must be based only on what he is allowed to hear. A litigation is in essence a trial of skill between opposing parties conducted under recognised rules, and the prize is the judge's decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at boxing contests, they see that the rules are kept and count the points. It follows from this that a party to a litigation is entitled to conduct it on the footing that the rules will be observed and that they will not be altered while the contest is in progress.⁴¹⁷

The assumptions behind a system determine in part the choices that are made. In view of the existing inquisitorial underpinnings, it is not surprising that the Commission is allowed to examine breaches other than

⁴¹⁶(1982) 3 EHRR 1, para. 30.

⁴¹⁷(1962) S.C. (HL) 36, 52, and also cited by Lord Hope, *op. cit.*

those the complaint was filed against.⁴¹⁸ For example, the case *Foti and others v. Italy*⁴¹⁹ concerned the applicants' prosecution for acts committed in the course of demonstrations that had taken place in Italy between 1970 and 1973. The Commission decided to examine of its own motion the question whether a hearing had taken place "within a reasonable time" as required by Article 6 (1) ECHR and declared the application admissible. The Italian authorities disputed the reach of the *ex proprio motu* powers of the Commission but the European Court rejected the following objection of their lawyers:

The Commission is without any doubt empowered to decide upon the characterisation in law to be given to a matter, but solely on respect of the facts impugned before it. The original complaint formulated by the three applicants under Article 6 para. 1 was directed against the transfer of their trials to the Potenza Regional Court and against that alone. By taking it upon itself of its own motion, as from 9 May 1977, to review observance of their right to a hearing "within a reasonable time", the Commission has thus failed to confine itself to applying the maxim "da mihi facta, dabo tibi jus", thereby exceeding its jurisdiction.⁴²⁰

The inquisitorial foundations in Strasbourg have a bearing on the handling of questions of law. There is an inquisitorial foundation behind the European Court's surveys of the laws of the member states when it sets about to find a "common denominator" derived from what is said to be a "European consensus"⁴²¹ or a "European public policy"⁴²² and particularly, in the use made of the outcome of the inquiry in the construction of the ECHR⁴²³

⁴¹⁸Neumeister case, para.16.

⁴¹⁹(1986) 71 ILR 366.

⁴²⁰(1986) 71 ILR 366, 378.

⁴²¹Laurence R. Helfer, "Lesbian and Gay Rights as Human Rights: Strategies for a United Europe", (1992) 32 Va. J. Int'l L. 157.

⁴²²Pablo Antonio Fernández-Sánchez, Las obligaciones de los estados en el marco del Convenio europeo de derechos humanos, (1987), 44.

⁴²³More details on that approach will be supplied in chapters 7 to 10.

and the use of the doctrine of the margin of appreciation.

These practices are in contrast with what judges are expected to do in adversarial systems. As a rule, judges will not research legal arguments outside court.⁴²⁴

Admittedly, it may be speculated that the readiness to resort to some inquisitorial measures by the judges may depend, among many other things, on their training and their temperament. Even the actual composition of the chambers of the European Court may carry weight on the selected approach.⁴²⁵ The fact that the majority of the judges are civil law trained may also influence their understanding of how proceedings should be conducted as well as their readiness to resort to the available inquisitorial devices, even if it is argued that the Court is unique, with its own practices⁴²⁶ and way of interpreting the ECHR.⁴²⁷ Interestingly enough, Judge Pettiti made the comparative point that the purpose of drawing out the judges' names from among all the others was to avoid the unevenness in the *jurisprudence* that may result from the separate work of permanent "Anglo-saxon" or "civilian" chambers.⁴²⁸

⁴²⁴As regards Scottish civil cases see The Right Honourable Lord Hope, *op. cit.*, 11.

⁴²⁵For more on this see chapter 10 of this dissertation.

⁴²⁶Françoise J. Hampson, "The United Kingdom before the European Court of Human Rights", (1989) 9 YEL 121,128.

⁴²⁷For further details see John G. Merrills, The Development of International Law by the European Court of Human Rights, (1988) in which he stresses that the Strasbourg interpretation is independent from the interpretation of the law or of the concepts used in the domestic jurisdictions of the member states.

⁴²⁸Louis-Edmond Pettiti, *op. cit.*, 32. Further, it is also interesting to observe that a somewhat similar comparative issue has apparently been taken into consideration at the United Nations Security Council in the appointment process of a chief prosecutor for the tribunal set up to try suspected Balkan war criminals. In "Cells finally ready for war criminals", Ian Williams of The European, July 22-28, 1994, reports that: "Disputes over procedure, funding and powers have delayed action by the tribunal. For example, the Security Council, which was concerned at the presumed Anglo-Saxon common law bias of Goldstone [the appointed prosecutor, from South Africa] and his Australian deputy, Graham Blewitt, wanted a second deputy from a Roman law country. But South African civil law is Roman Dutch, with English court procedures added on, so Goldstone should be in a good position to bridge the gap."

The procedure could be described as
*"contradictoire"*⁴²⁹

In common with French administrative procedure, the Strasbourg procedure can be described as *"contradictoire"*, denoting the tendency to give each side the opportunity of contradicting what the other one has said but without putting them in the same procedural position or turning the adjudicating organs into (completely) neutral arbiters. The adversarial connotations of the procedure are quite unlike the ideal of the common law world, where the archetype is that each party is to press its respective viewpoints before a judge who acts as an impartial umpire. In Strasbourg, a case is argued by way of *"contradiction"* in the sense of a watered down version of the adversarial proceedings of the common law world, because the organs intervene to ensure that the individual and the state are equals throughout the proceedings but this equality is achieved by means of the organs' active participation in an inquiry into the conduct of the respondent government.

It should not be forgotten that all supranational systems of protection of human rights are underlain by the paradox of the two contradictory roles played by the governments. Governments are the supporters of the system as a whole but also, as respondent parties, they are the "perpetrators" of the alleged breaches. This particular situation may partly justify the need for the Strasbourg machinery of approaching all cases guided by the ideal of an "inquiry" rather than letting unequal parties battle out their differences:

⁴²⁹Gérard Cohen-Jonathan, La Convention européenne des droits de l'homme, (1989), 172.

There seems to be something of an inconsistency between, on the one hand, the collective guarantee of rights, which may assume that the object of all the High Contracting Parties, the Commission, and the Court is the furtherance and protection of human rights, and the notion of a respondent State. The government has to argue that its domestic law is in conformity with the requirements of the Convention. To do anything less might be held to imply a breach of its obligation under Article 1 of the Convention to '...secure to everyone within their jurisdiction the rights and freedoms...' contained therein. If a government is forced on the defensive, it will have to adopt the three-tiered defence familiar in criminal law. One, the dispute falls outside the Convention; two, if not, there has been no interference in the exercise of the right and, three, if there has been an interference, it was justifiable.⁴³⁰

The procedure is slowly becoming a unique "blend" of elements from the legal traditions of the member states. The passage of time brought more procedural rights for the individual through the injection of further adversarial elements, allowing them to become much more involved in the lawsuit.⁴³¹ Specifically, individual applicants can participate and be represented before the Court to the extent that they enjoy an status (almost) comparable to that of the Commission or the states parties to the proceedings.⁴³² This separated further the system from the normal practices of international courts where individuals have no standing and also marked an advance of the procedural elements of common law ancestry leading to further openness of the proceedings. Incidentally, this openness is paralleled by a similar requirement placed on the member states by the case law of the European Court.⁴³³ When a case is referred to the Court individual applicants may indicate that they wish

⁴³⁰Françoise Hampson, "The United Kingdom before the European Court of Human Rights", (1989) 9 YEL 121,131.

⁴³¹See particularly Rules 30 (Representation of the Applicant) and 33 (Communication of the Application on Request) of the Rules of Court.

⁴³²Thomas Buergenthal, *op. cit.*, 111.

⁴³³See the analysis in Chapters 7 to 10.

to participate in the proceedings and if so, they are entitled to representation by counsel. Technically speaking, however, those improvements in the individuals' *locus standi* particularly after the 1983 amendment of the Rules did not make an individual applicant a party to the case:⁴³⁴ they still cannot seize the Court⁴³⁵ for example. In this sense, the respondent governments, as subjects of international law, appear to be the only one party before the Court⁴³⁶ and the absence of complete procedural equality still calls for the equalising intervention of the Strasbourg organs to compensate for the individual's disadvantage. For these reasons, the procedure is best described as "*contradictoire*" in terms of the tradition of French procedures rather than in the adversarial understanding of the common law. Nonetheless, the (slow) move towards granting equality to the parties started with the hearings of the *De Becker* case, where the applicant was admitted as a witness to give evidence before the Commission, which incidentally, may appear as a rather surprising practice for those trained in the civil law.⁴³⁷ Further, in the *Lawless* case the Court considered that the participation of the applicant was by means of the Commission's Report, the observations made by the delegates of the Commission and evidence given by the applicant before the Court as a witness, as the Court "[...] may also hear the Applicant in accordance with Rule 38⁴³⁸ of the Rules of Court [...]"⁴³⁹; an approach that was, however, very cautious. In the 1970s the case of *De Wilde, Ooms and Versyp*⁴⁴⁰ prompted the Court to take another step forward authorising the Commission to avail

⁴³⁴ John G. Merrills, *op. cit.*, 5.

⁴³⁵ Article 48 ECHR. Protocol Number 9 contains provisions authorising an individual to seize the Court, however, it has not become effective yet.

⁴³⁶ Hans Christian Krüger, "Le mecanisme de protection de la Convention européenne des droits de l'homme", *L'Avocat et l'Europe des 12 et des 21: La defense des droits de l'homme: L'integration communautaire perspectives 1992*, Mady Schaffer (ed.), (1988), 37.

⁴³⁷ François Monconduit, *op. cit.* .

⁴³⁸ Now Rule 40 of the Rules of Court.

⁴³⁹ 3 Yearbook 492, 516.

⁴⁴⁰ (1981) 4 EHRR 1.

itself of the assistance of the lawyer for the applicants.

The "inquiry" requires investigations, the examination of evidence, the questioning of witnesses and so on. The Court will normally ask the following questions: first, whether there are restrictions placed on a protected right and whether those limits are "prescribed by law"⁴⁴¹, "in accordance with the law"⁴⁴² or subject "to the conditions provided for by law and by the general principles of international law"⁴⁴³; second, if so, whether the restrictions have a legitimate purpose; third, if so, whether the restrictions are proportional to the achievement of the purpose sought; and fourth, if so, whether the restrictions are "necessary in a democratic society."⁴⁴⁴ The approach is one that does not arrive at the conclusions on liability exclusively by the process of pitting one side against the other, each pressing their respective positions before an umpire, who then allows the facts appear from this contest. The method of the inquiry starts legal reasoning from the statutory texts and this practice paves the way for justifying the decisions in a deductive manner laid out as a syllogism.⁴⁴⁵

The situation changes if the organs are to deal with inter-state applications, as the role of the Commission is more detached, probably because there is already "equality" between the member states parties to the case. By ratifying the ECHR a state is deemed to have accepted the jurisdiction of the Commission to receive complaints from other member states alleging a breach of the Convention. The applicant state is not required to

⁴⁴¹Articles 9 (2), 10 (2) and 11 (2) ECHR.

⁴⁴²Article 8 (2) ECHR and Article 3 Protocol 4.

⁴⁴³Article 1 Protocol 1.

⁴⁴⁴Articles 8, 9, 10, 11 ECHR and Article 2 Protocol 4.

⁴⁴⁵For more on this see chapter 6 of this dissertation.

demonstrate any special interest or relationship to the victim of the violation or in its subject matter. Most inter-state applications were filed against states which had not recognised the right to individual petition and thus could be held internationally accountable for a violation of the ECHR only by inter-state proceedings.⁴⁴⁶

The procedure favours written over oral exchanges

The preference for written exchanges is another example of the affinity between Strasbourg and continental courts⁴⁴⁷ particularly since the European organs perceive their role as being responsible for the inquiry into the issues of the case and the parties are simply not allowed to fight their differences to a finish. The procedure is a reflection of these assumptions and therefore, it is not geared towards providing the parties with equal opportunity to make the better case nor it is concerned with establishing a framework for the parties to conduct a dialogue between themselves and with the tribunal.

On the other hand, another integrant part of this "mix" of systems and traditions is provided by the approaches of legal practitioners to the cases. While it is conceded that the style of handling litigation is influenced by various tactical and strategic considerations variable from case to case, lawyers nevertheless follow certain paths related to their backgrounds and expectations. A contrast made between English and continental lawyers on how they handle the cases procedurally before the EU organs could apply

⁴⁴⁶Thomas Buergenthal, op. cit., 88.

⁴⁴⁷See for further details: P. van Dijk and G. J. H. van Hoof, Theory and Practice of the European Convention on Human Rights. The two heads of the applications' division look through the letters that arrive at the Secretariat in order to assign each one of them to an individual lawyer of the Secretariat for further processing. Unsurprisingly, the choice of lawyer will be determined by the language in which the letter is written (unless French, English or German) and the State against which the complaint is directed.

equally well to Strasbourg. It has been said that English lawyers have two contributions to make in relation to legal practice before the EU organs, and which their continental colleagues are not likely to possess: unsurprisingly, the first is their expertise in their particular national law, but more importantly, there is their "essentially 'national' skills, ie a distinctive (by European norms) approach to litigation, and the art of oral advocacy."⁴⁴⁸ The point is, however, that those "national" skills may clash with the Strasbourg "*contradictoire*" procedure. Françoise Hampson found a gulf as a result of contrasting the attitudes of common lawyers and their continental counterparts in their handling of the cases:

British lawyers may be more prone to scoring points off one another or seeking to discredit the other side than their continental colleagues. This is perhaps a product of an attempt to make the better case rather than to persuade the court on the basis of the issues involved. There is a danger that, in the eyes of the judges, this trivializes major issues relating to the moral, legal and political order of Europe.⁴⁴⁹

For these reasons, one of the weighty elements in efficient supranational litigation is the lawyers' grasp of their differences with practitioners and judges from other traditions. They have to familiarise themselves also with the underpinnings of the supranational procedure which might be very different from their own, so as not to remain "trapped" in their national law ways. Comparative law presses home the general idea that one's legal system is not the only one in the world and that by simply understanding it one cannot necessarily ask the right questions elsewhere. For practitioners, the awareness of the tensions between the footings of the

⁴⁴⁸Nicholas Forwood QC, "Working with European Lawyers", November 1989, Counsel: The Journal of the Bar of England & Wales, 17.

⁴⁴⁹Françoise Hampson, *op. cit.*, 129.

ECHR, its system and those of national law may help in sharpening their approach to litigation on a supranational level and at the same time highlight the uniqueness of the Strasbourg system in relation to the other legal orders of the member states.

The Commission considered its procedure to be written under the requirement of Article 33 ECHR that it should meet *in camera*, and although the principle was not taken to extremes, the preference is unsurprising in view of other inquisitorial underpinnings. The absence of free exchanges between counsel and court (perhaps also due to the language barrier) and the time-limits placed on lawyers to speak make the Strasbourg court-rooms feel altogether different from those in the common law world. The Rules set down that, "The proceedings before the Court shall, as a general rule, comprise as their first stage a written procedure in which memorials⁴⁵⁰ are filed by the Parties, the applicant, and if it so wishes, the Commission [...]."⁴⁵¹

Orality is of course not banned and the weight of the oral procedure before the two European organs should not be underestimated. Upon the declaration of admissibility of an application, the parties or their representatives can deliver oral defence speeches or agree to confront each other directly.⁴⁵² Thus the Commission can make arrangements for those special sessions. The Rules of Court also open the possibility to concentrate the

⁴⁵⁰Rule 37 (4) of the Rules of Court requires that such memorials be filed in 40 copies.

⁴⁵¹Rule 37 of the Rules of Court.

⁴⁵²Incidentally, although proceedings at the Commission are normally conducted in either French or English, which are the official languages of the Council of Europe, witnesses can use a language other than those two, and the Council of Europe will provide assistance for the interpretation. (For further details see: Council of Europe document DH (54) 3, p. 12. and also, Council of Europe document DH (55) 9, p. 32. According to the usual practices at the Council of Europe, the parties can resort to a language other than the official languages if they make the necessary arrangements.)

proceedings in one oral stage.⁴⁵³ Despite various concessions towards orality, however, the normal practice is still to require written memorials and other written documents from those intervening in the proceedings, and further, in several copies.⁴⁵⁴

Is the European law of Human Rights an identifiable body of law from the point of view of the procedure?

While there is an ever-increasing number of applications examined by a machinery operating under various procedural rules,⁴⁵⁵ they all provide a framework to accommodate the divergencies between the member states rather than claim to be the rules of procedure for a single system of human rights protection. Moreover, as the number of member states increases with the admission of several countries of Eastern Europe, their various influences even on the procedural aspects of the system are therefore likely to increase. Procedurally, the European Court and the French Council of State have various points of similarity and share the same "spirit". The procedure in Strasbourg is laid out in steps largely equivalent to those of the litigious administrative procedure in French law (or the many legal systems to which these French ideas were transplanted), the overall attitude of the Strasbourg organs is that of an inquiry, and the procedure reflects these assumptions.

⁴⁵³Rule 38 of the Rules of Court. For example, it was done in the *Ringeisen* case ((1979-80) 1 EHRR 455), where the Court decided after consultation with the agent of the Austrian Government and the delegates of the Commission that no (written) memorials were to be filed.

⁴⁵⁴Rule 37 (4) of the Rules of Court: filed documents are transmitted by the Registrar to the judges, the agents of the parties, and the delegates of the Commission and subsequently, to the President of the Chamber, who, after consultation with the parties concerned, will fix the date of the opening of the oral proceedings (Rule 38 of the Rules of Court). Rule 32 of the Rules of Court requires that 40 copies of the application of a Contracting Party or the Commission to institute proceedings before the Court be filed with the Registrar.

⁴⁵⁵Set down in the ECHR, the Rules of Procedure of the Commission, the Rules of Court and the organs' case law.

The study of the procedural rules or the *travaux préparatoires* did not disclose, however, that the doctrine of the margin of appreciation is one of the tools used in decision-making, and its existence shows another civilian "infiltration": "neither the Commission nor the Court has ever taken express notice of the municipal roots of the margin doctrine, and its mixed martial and civil/administrative law origins seem to have merged in the Strasbourg case law".⁴⁵⁶

The various common features between the French tradition and the Court of Human Rights do not authorise, however, to say that both courts are identical or that they follow the same procedures. The Commission, for example, does not fulfil the role of an A-G before the Court, the judges can issue separate opinions and also, the "administration" whose acts come under scrutiny is not a domestic one but the ("sovereign") governments of the member states. This all goes to say that the civilian elements borrowed "grew" differently in the supranational level. In this limited sense, the European procedure could be identified as a body of law, however, it is necessary to insist that there are other systems of human rights protection coexisting with Strasbourg. The Strasbourg procedure itself requires the exhaustion of all domestic remedies revealing that it comes second to whatever (other) remedies are available in municipal law, therefore, reinforcing the idea that human rights law does not come from a singular power source. The diffusion of the law takes place because of the presence of a multiplicity of political and legal power centres that subject the individual to many institutional systems. Every one of those multiple systems operates only as regards certain legal relationships. No single

⁴⁵⁶Howard C. Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence", (1987) 3 Connecticut Journal of Int'l Law 111, 123.

system prevails over all others and in addition, all of them can work together without major incompatibilities.⁴⁵⁷ It has been argued that several systems operating together give more power to the judges through the exercise of judicial review:

A new pluralism is emerging. Statutory law now has many companions and competitors: the "higher law" of the constitutions; the law of the Communities, which also claim a "higher law" status, higher even than that of national constitutions; written and unwritten "general principles", both national and transnational; and national and transnational bills of rights. At the same time a new role for adjudicators naturally emerges because the adjudicators' role is always enhanced and magnified by pluralism and competition of lawmaking sources. Pluralism and competition demand comparison and control. They demand judicial review.⁴⁵⁸

Recourse to Strasbourg is neither simple nor speedy,⁴⁵⁹ to the extent of having received the following depiction: "The problems of the organs of the European Convention can be summarised in only two words: overload and delay."⁴⁶⁰ The system that was set up in the 1950s (and which has undergone relatively few changes⁴⁶¹) became perhaps "a victim of its own success."⁴⁶² and some projects of reform were devised to provide solutions. The sheer number of applications still awaiting resolution, the admission of new member states and the repeated calls for reform supply further support to the view that the machinery and the procedure as they stand today could simply not take over the other systems of

⁴⁵⁷Neil MacCormick, "Beyond the Sovereign State", (1993) 56 MLR 1, 8.

⁴⁵⁸Mauro Cappelletti, "The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis", (1980) 53 Southern California Law Review 409, 443.

⁴⁵⁹Rolv Ryssdal, "The European Court of Human Rights and Gérard Wiarda, in: F. Matscher and H. Petzold (ed.), Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda, (1988), 1.

⁴⁶⁰Léon R. Poffé, "The European Convention on Human Rights: Merger Proposal for Commission and Court", (1989) 2 Leiden Journal of Int'l Law 90, 91.

⁴⁶¹Rolv Ryssdal, The future of the European Court of Human Rights, European Court of Human Rights documents (1990) (ECOUR90296.AB), 9.

⁴⁶²Andrew Z. Drzemczewski, "The need for a radical overhaul", (January 29, 1993) NLJ 126.

protection already in existence if that were the intention. It is hoped that some decongestion will be achieved by the changes Protocol 11 will bring to the existing mechanism.⁴⁶³

When Protocol 11 enters into operation, a permanent Court will replace the present semi-permanent Court and Commission, and the Committee of Ministers will no longer be able to determine whether the ECHR has been violated. The adjustments, sizable as they are, do not seem however to involve any radical departure from the (civil law based) "spirit" of the system discussed in this chapter. The right of individual petition and the jurisdiction of the new Court (with respect to individual and inter-state applications) will be mandatory. After the filing of an application, preliminary contacts will be made with the Registry of the Court. Upon registration an application will be assigned to a Chamber which will appoint a judge *rapporteur* who will carry out the activities presently in the hands of the Commission.⁴⁶⁴ If at least one judge in the three-member Committee considers that the application is admissible, then it will be communicated to the respondent government. Written observations will be filed and the fact-finding will be performed. There will be a possibility of a friendly settlement at this stage. If unsuccessful, then a Chamber will decide the case. Only in exceptional circumstances will a Grand Chamber pass judgment.⁴⁶⁵

⁴⁶³Andrew Drzemczewski, "Putting the European house in order", NLJ, May 13, 1994, 64.

⁴⁶⁴Protocol 11, Article 27: It establishes that Committees are composed of 3 judges, Chambers of 7, and a Grand Chamber of 17.

⁴⁶⁵Protocol 11, Article 30: a relinquishment of jurisdiction to the Grand Chamber will take place should a serious question of interpretation of the ECHR or its Protocols arise, or where the resolution of a case might contradict previous case law. This relinquishment of jurisdiction can take place before issuing judgment and unless one of the parties to the case objects. The parties can request that a case decided by a Chamber be referred to the Grand Chamber (Article 44).

There were two main projects of reform. One proposed the creation of a single court (backed by Switzerland)⁴⁶⁶ in order to "remove the competitive element which certain observers have on occasion detected already in the present relations between the Commission and the Court."⁴⁶⁷ The unsuccessful project (proposed by the Netherlands and Sweden) envisaged the Commission operating as a court of first instance and the European Court exercising appellate jurisdiction. It is clear that both schemes acknowledged the maturity of Strasbourg and reinforced the judicial over the political activity of the system as they proposed doing away with the ability of Committee of Ministers to make decisions on breaches of the ECHR.⁴⁶⁸

⁴⁶⁶See, for further details: "Report of the Committee of experts for the improvement of procedures for the protection of human rights (DH-PR) to the Steering Committee for Human Rights (CDDH)", Council of Europe Document H (89) 2.

⁴⁶⁷Andrew Z. Drzemczewski, *op. cit.*, 134.

⁴⁶⁸See previous chapter: the new situation might therefore put the system further along the ideas of the "strong" Europeans in the stages that led to the drafting of the ECHR. Before the signature of Protocol 11, apparently the majority of the Commission members favoured a two-tiered judicial system that would enable the Commission to operate as a court of first instance capable of issuing binding decisions. The minority of the Commission favoured a single court, though. The majority of the judges of the European Court preferred either limited institutional reforms or the Dutch-Swedish proposal, but the Parliamentary Assembly, however, supported the single court concept. (See: Alastair R. Mowbray, "Reform of the Control System of the European Convention on Human Rights", [1993] PL 419.)

Conclusions

The aim of this chapter has been to examine the extent to which civilian elements have been adopted by the Strasbourg procedure and the main finding was that the continental tradition influenced the most the "spirit" of the European Court and machinery particularly through "borrowings" from to the French administrative law practices (or from other continental countries inspired by the French example). Despite the existence of a machinery and a procedure of such inspiration, the European Court is not a clone of any French or more generally, any civilian tribunal. The analysis showed that transplants "grow" differently in different environments. Although Strasbourg follows broadly in the tradition of continental public law procedures as regards the Court's powers, functions and jurisdiction, it also contains several unique features. There is no A-G, judges can issue separate opinions and as time passes the development of the Court's "autonomous concepts" and standards adds up in order to set the system apart from its continental roots. These roots, however, were made plain by the following characteristics: the procedure consists of stages broadly equivalent to those of the (French) litigious administrative proceedings, it leans towards an inquisitorial style, it could be best described as "*contradictoire*" rather than adversarial in the common law sense of the expression, and it favours written over oral exchanges.

The European system of human rights protection works superimposed to the heterogeneity created by other systems in the member states without replacing them. There is a vertical tension between the national and supranational spheres and Strasbourg provides a shared framework to diversity. The interpretation of the ECHR

takes place in the environment created by the Strasbourg machinery and its rules of procedure where the various traditions of the member states come together. The tendency towards one procedural system for Europe that the mere existence of the Strasbourg machinery may suggest is set aside by the cultural and legal diversity it must accommodate. Moreover, if all other systems of protection were to disappear overnight, the Strasbourg system would not be capable of moving in to fill the vacuum. Although the procedure is mainly statutorily described (in the tradition of the continental legal orders), a crucial tool to manage the complex partnership between Strasbourg and the member states is the civilian doctrine of the margin of appreciation, which is not expressly mentioned among the rules of procedure.

Finally, this study shows that it is through a civil law influenced procedure that the common law as well as the civil law inspired elements of the ECHR (discussed in the previous chapter) are to be "applied" to situation. The outcome of the "application" of the ECHR to a case through this control machinery will be spelled out in a judgment (as will be discussed in the next chapter) whose form of justification is deductive. These inferences underline the intricacy of the system and the challenge of ECHR interpretation: to render the meaning of the ECHR whose origin is at the crossroads of traditions into the various contexts provided by the cases (themselves at similar crossroads) heard by the European organs through a procedure which has continental administrative roots. The comparative method is helpful to tackle these interpretational challenges.

Decision-making and interpretation in Strasbourg: the judgments

The style of the
European Court judgments
and the hierarchical position
of the ECHR in the Strasbourg system

*But the words of a treaty are not
enough for there to be
harmonisation of its subject
matter. There must be
harmonisation of all the
jurisprudence that goes with it.⁴⁶⁹*

Introduction

This chapter examines the style of the judgments of the European Court in the light of the typical assumptions of the Western European legal traditions that had influenced the development of the human rights system of the Council of Europe: civilian, common law and the mixtures of them.

The study concentrates on the process of legal interpretation. The purpose of this examination is to determine the impact of the style on the decision making process, the hierarchy and handling of sources and their (relative) importance in relation to the authority enjoyed by the European Court in its system. "Style" is

⁴⁶⁹The Right Honourable Lord Hope, "From Maastricht to the Saltmarket; A Lecture delivered before the Society of Solicitors in the Supreme Courts of Scotland" (1992), 13.

understood as the distinctive manner of the European Court of expressing itself, which is visible in the shape and argumentation of the judicial decisions. The analysis will consequently be based on the evidence of decided cases read from the point of view of uncovering their legal reasoning and the interpretation of rules.

Judgments will be divided into three parts to assist understanding: major premiss, minor premiss and a conclusion, a segmentation based on the deductive form they take. A premiss is taken to mean one of the two propositions in a syllogism from which a conclusion is drawn, and for the present purposes, the major premiss lays down the legal rules, of statutory origin or extracted from the *jurisprudence*, the minor premiss deals with the facts, and the conclusion is the *dispositif* of the judgment, logically derived from the two premisses.

The topic of statutory interpretation in Strasbourg will be discussed as well as the question of judicial review of government conduct by reference to a supranational bill of rights. Finally, the subject of the subsumption of the facts into the rules will be put, and to close, the conclusions of the chapter will be drawn.

The form and content of a European judgment

Are the European Court decisions identifiable as "European"? If we use the term "European" in the context of the Convention system and equate it to "supranational", that is, opposed to "national", then an affirmative answer is possible.

It was natural that in such a system the legal traditions of Western Europe, civilian, common law and the mixtures of them had contact with Strasbourg and influenced it in

different ways. In fact, it appears that the civil law has left an important imprint on the configuration of decision-making: the European Court has developed its own version of the syllogistic style in which legal reasoning gravitates towards a logical deduction from premisses.

Such an arrangement is in contrast with the common law "style". Professor N. MacCormick⁴⁷⁰ pointed out (tongue-in-cheek) that English lawyers and writers usually praised the "illogical" quality of their system, and thought it an odd continental practice to be "logical". Of course a dichotomy of logical versus illogical is an overstatement, but there is something in the distinction. A syllogistic style in a common law ruling would certainly be out of the ordinary; however, if one looks hard enough, and most importantly, recasts the words of a judgment, then a logical argument in three statements can be discerned: two premisses with a conclusion following from them as a matter of course. A considerable effort of re-organisation may be necessary to achieve that end but the point here is that although a deduction eventually takes place in a common law judgment, the justification relies on the weighing model, i.e. the opinions bring out why the judges reached the pronouncements they did as their assertions may be helpful for use in future cases. The possibility of re-writing decisions does not erase the dissimilarities between the legal traditions in the arrangement of a ruling and in the identity of the propositions from which their reasoning departs and is grounded.

In Strasbourg, two periods are recognisable in the style of the case-law. In the 1960s it was that of (higher) continental law courts, as for example, the reasoning of the preliminary ruling of the *Belgian Linguistics*⁴⁷¹ case

⁴⁷⁰N. MacCormick, Legal Reasoning and Legal Theory, (1978), 39 and 41.

⁴⁷¹(1979-80) 1 EHRR 252.

in 1967, where the section dealing with the law was a single complex sentence with subordinate clauses showing the reasoning steps and ending up in a short ruling "the Court decides...". The parallel with the decisions of the French Court of Cassation was obvious: an opinion of that tribunal is usually in the form of a single sentence with the following parts: "The Court, having seen" (there usually follows the statutory texts cited by the parties), then a few "whereases" to end with "for these reasons quashes" or "rejects" the petition.⁴⁷² Hardly a writing style to let the judges blend in any case law. It was clear that the Court was still learning its trade.

From the judgment on the merits in the *Belgian Linguistics* case in 1968 an arguably less cumbersome mode of expression⁴⁷³ was introduced in order to deal with many issues: a long series of paragraphs beginning with the word "whereas." There is no single collective judgment like that of the ECJ or still many continental courts so the style is in this aspect closer to the common law countries⁴⁷⁴ where judges normally disclose individual opinions.⁴⁷⁵ Nevertheless, in the case of the ECJ there is an opinion delivered by the A-G which can throw light on the issues of the case even though the ruling of the ECJ may point in a different direction afterwards, although that is very rarely the case. In Strasbourg there is no equivalent to an A-G, which leaves the European Court's own decision to bear all justificatory weight.

⁴⁷²See, for example: Andrew West, The French Legal System, (1992).

⁴⁷³J. G. Merrills, The development of international law by the European Court of Human Rights, (1988), 26.

⁴⁷⁴Although this is not universal, e.g., the Inner House of the Court of Session in Scotland now frequently issues a 'Judgment of the Court' and conversely, the practice of issuing corporate judgments is not the norm in every civil law jurisdiction: the German Constitutional Court discloses the votes of the judges.

⁴⁷⁵J. G. Merrills, *op. cit.*, 21 and 22.

The changes in Strasbourg have not ousted the generally civilian approach, however: the Court's argumentation mode still tends to the professorial, logical and structured discussion of the law and the facts, and the style is still under argued from the common law perspective. In a system influenced in many ways by the civilian tradition, it is not surprising that the European Court takes notice of professors and many of its judges are academics. Law professors have traditionally been highly regarded on the Continent,⁴⁷⁶ a situation, as is well known, dissimilar from that in common law jurisdictions; the contrast has to do with the different historical development of both legal traditions. The professors, jurists and commentators developed the meticulous style of argumentation so well-suited to elicit principles from the Roman texts rediscovered in Northern Italy in the eleventh century⁴⁷⁷, or the Napoleonic codes issued and exported in the nineteenth. The ancestry of the Strasbourg's internally orderly style which tends to place justification in an external source can therefore be traced to that scholarly method.

The civilian style of the Court and some separate opinions (particularly those written in a tone that would please a law professor, even with scholarly citations⁴⁷⁸) is challenged sometimes by other separate opinions argued from a common law stance, which is more discursive and dialogic. In the following example it has been a deliberate intention of this writer to pair two dissenting opinions in these contrasting styles. The case of *Brannigan and McBride v. the United Kingdom*⁴⁷⁹

⁴⁷⁶R. C. van Caenegem, Judges, Legislators and Professors: Chapters in European Legal History, (1987), 64.

⁴⁷⁷M. H. Hoeflich, "Law & Geometry: Legal Science from Leibniz to Langdell", (1986) 30 *American Journal of Legal History* 95, 97.

⁴⁷⁸For example, see the very well argued dissenting opinions by Judge S. K. Martens in *Cossey v. United Kingdom* (1991) 13 EHRR 622 and *Borgers v. Belgium* (1993) 15 EHRR 92, both of which shed considerable light on the issues.

⁴⁷⁹(5/1992/350/423-424).

concerned the arrest and detention of two suspects under the PTA.⁴⁸⁰ The European Court found that the British authorities' refusal to provide judicial control of some detentions was within their margin of appreciation, particularly in view of a derogation of 1988 following the *Brogan and others* case. Judges Pettiti and Walsh did not share those views and said so in very different styles. The opinion of the Irish Judge Walsh, as is the case of decisions in common law countries⁴⁸¹, is discursive and with narrative elements. "A reason put forward by the Government for being unwilling to bring an arrested person before a judge "promptly" after arrest (or not at all until it is decided to charge him) is the possible embarrassment to the judges in knowing what was in the mind of the arresting officer ...", he writes. He immediately disagrees with what the United Kingdom proposed, "It is quite wrong to suggest that the adversary procedure of the common law requires such disclosure, particularly on the first appearance in court."⁴⁸² He then sifts the facts of the case into their bearing on the law. After pointing out that Article 5 (3) ECHR safeguards against arbitrary executive arrest or detention that could give rise to complaints under Article 3 ECHR "which cannot be the subject of derogation", he writes "In the present case ..." and lists the actual facts, that is, the number of hours of detention and interrogation of both applicants, and closes the paragraph with "The object of these interrogations was to gain "sufficient admissions" to sustain a charge, or charges." He disagrees with the reasoning of the European Court as regards the availability of the safeguard of habeas corpus: "The

⁴⁸⁰Section 12 (1) (b) of the Prevention of Terrorism (Temporary Provisions) Act 1984.

⁴⁸¹See: Robert S. Summers, "Statutory Interpretation in the United States" at 446 and Zenon Bankowski and D. Neil MacCormick, "Statutory Interpretation in the United Kingdom" at 392, in: N. MacCormick and R. Summers, Interpreting Statutes: A Comparative Study, (1991).

⁴⁸²(5/1992/350/423-424) dissenting opinion of Judge Walsh, para. 5.

Court, in paragraphs 62 to 67 inclusive of its judgment, overlooks the information before it to the effect that the so-called safeguards are, in practice, illusory as their availability within the first forty-eight hours of detention is solely dependent upon police willingness" and concludes "Even the great historic remedy of habeas corpus, theoretically available almost instantly, can be put out of the reach of the arrested person by reason of non-access to the world outside the detention centre."⁴⁸³ All this discursive reasoning became a necessary introduction to his conclusion "In my opinion there has been a breach of Article 5 § 3 of the Convention in respect of the detention of each of the applicants."⁴⁸⁴ He also found a breach of Article 13 ECHR.⁴⁸⁵

It should be said, however, that Walsh's style has company in Strasbourg. Let us briefly take the case of *Campbell v. the United Kingdom* where the European Court found a breach of Article 8 ECHR as regards the control exercised by the Scottish prison authorities on a prisoner's correspondence to and from his solicitor and with the European Commission of Human Rights. It is sufficient to illustrate the style to quote just a part of a paragraph of Sir John Freeland's partly dissenting opinion, written in the argumentative style of the common law. He hypothesises a solution which he then discards because the circumstances were different:

If I were satisfied that it had been established that a particular item of correspondence between the applicant and his solicitor indeed concerned either contemplated or pending proceedings and had been opened by the prison authorities without their having had a reasonable cause to suspect abuse, I would therefore have been prepared to vote for a

⁴⁸³(5/1992/350/423-424) dissenting opinion of Judge Walsh, para. 12.

⁴⁸⁴(5/1992/350/423-424) dissenting opinion of Judge Walsh, para. 13.

⁴⁸⁵(5/1992/350/423-424) dissenting opinion of Judge Walsh, paras. 14 and 15.

finding of a violation of Article 8 in this respect. That is, however, not the case.⁴⁸⁶

Coming back to *Brannigan and McBride v. the United Kingdom*, the French Judge Pettiti challenged the finding, but not the style of the Court's judgment. His logically inferred manner is another variety of the civilian logical mode of thought, somewhat reminiscent of the practices of the Italian courts⁴⁸⁷, where the necessary conclusion follows logically from a series of given premisses laid down in steps and which give no space to the weighing model of the common law. His steps⁴⁸⁸ were the following: "The European Court has jurisdiction to carry out a review of the derogations from the guarantees recognised as essential for the protection of the rights set out in the Convention ...", then, "Even if it is accepted that States have a margin of appreciation (...) the situation relied on must be examined by the European Court." Mr. Pettiti recognises that "The fact of terrorism and its gravity in Northern Ireland is incontestable" on top of which he adds another argument, "... the derogation cannot constitute a carte blanche accorded to the State for an unlimited duration ..." He then adds further arguments while steering his opinion towards the conclusion he wishes to propound, and makes references to the case *Ireland v. United Kingdom*, to the arguments of the United Kingdom in the present case, to the Italian experience with terrorism where (apparently) judicial involvement in extended police custody was retained, and finally, to the dissenting opinions of two

⁴⁸⁶(52/1990/243/314) partly dissenting opinion of Judge Sir John Freeland, paras. are not numbered.

⁴⁸⁷On judicial interpretation in Italy, see: M. La Torre, E. Pattaro and M. Taruffo: "Statutory Interpretation in Italy", in: N. MacCormick and R. Summers, Interpreting Statutes: A Comparative Study, 240. At page 242, those writers argue that Italian rulings are not concerned with explaining to the parties why a certain decision was reached, but with justifying the legal correctness of the conclusion to the lawyers. Judges in Italy are professional lawyers who speak to other professional lawyers by means of arguments that only lawyers can appreciate.

⁴⁸⁸(5/1992/350/423-424) dissenting opinion of Judge Pettiti, paras. are not numbered.

Commissioners. After stating that "The [U.K.'s] argument based on the recourse to habeas corpus does not appear convincing ..." his conclusion follows inevitably from the points made, "From that point of view the conditions of the incommunicado detention were contrary to Article 5." He closes his reasoning, "In the Brannigan and McBride case, in my opinion, the Government's action fell outside the margin of appreciation which the Court is able to recognise" and reminds us of what in his view should have been the controlling principle to test the respondent government's behaviour, "The fundamental principle which must prevail and which is consistent with British and European tradition is that detention cannot be extended from four days to seven days without the involvement of a judge, who is the guarantor of individual freedoms and fundamental rights."

Accordingly, the different approaches to legal reasoning separate the legal traditions:

The difference in justificatory structures between civil law and common law systems is one of the few differences of justificatory practice between countries in our project that largely tracks the traditional 'civil law - common law' divide. The difference cries out for explanation. Perhaps one factor is that judges in the UK and the USA were themselves once lawyers who practised law in the 'discursive' or dialogic style. Also the British and American judiciaries have traditionally played larger roles in their systems than most of the other judiciaries in their systems. Perhaps, then, those judiciaries feel less need to proceed by way of deductive subsumption than do judges whose legitimacy has been more in doubt and only relatively recently fully won.⁴⁸⁹

The topics discussed in this chapter are organised following the particular syllogistic style of the decisions of the European Court.

⁴⁸⁹ Robert S. Summers and Michele Taruffo, in: N. MacCormick and R. Summers, *op. cit.*, 493.

Major premiss

To illustrate the reasoning of the European Court, excerpts from the *Moreira de Azevedo*⁴⁹⁰ case will be used to illustrate that reasoning starts from the rules (major premiss), then moves to the facts (minor premiss) and finally a conclusion is set out. (Although other examples are also provided). The facts of the case concerned a Portuguese national victim of a shooting incident in 1977. As a result of his injuries he had to take sick leave from work. The assailant (the victim's brother-in-law) was convicted and ordered to pay damages, however, the conviction was quashed on appeal. Later, the applicant appealed to the Supreme Court but his petition was rejected, so he took his case to Strasbourg, where he claimed that the outcome of the criminal proceedings were relevant to his plea for damages, that he was entitled to a hearing and that proceedings had taken too long overall. The European Court found Article 6 (1) ECHR applicable to his case.

In the judgment, a major premiss put down the applicable rule as the basis to build the rest of the syllogism.

Alleged violation of Article 6 § 1
Before making any ruling on the alleged violation of Article 6 § 1, the Court has to decide whether the provision is applicable. (...) In the Court's opinion, the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 § 1 of the Convention restrictively. (...) the case concerned the determination of a right; the result of the proceedings was decisive for that right (...) to intervene as an assistente [private prosecutor] is equivalent as filing a claim for compensation in civil proceedings. By acquiring this status Mr Moreira de Azevedo demonstrated the importance he

⁴⁹⁰(1991) 13 EHRR 721.

attached to the criminal conviction of the accused but also to securing financial reparation for the damage sustained (...)⁴⁹¹

The Court here has to say what the law is, but what is the situation as regards the relative value of sources? The legal traditions give different answers. To carry out a comparative study of the use of sources in Strasbourg it is necessary, therefore, to keep in mind that:

The proper object of comparison for the civil law methods of code interpretation is not the common law system of statutory interpretation but rather the methods of legal reasoning from precedents, the techniques of case law, the ways of distinguishing cases, of determining holdings and dicta, of ascertaining the *ratio decidendi* of previous cases, and thus finally distilling the rule of law applicable to the issues of a present case.⁴⁹²

The Strasbourg system makes much of the rules contained in the "statute book" of the Convention, not a restatement of previous laws or case law, which did not exist at a European level, but rather a "creation of reason", which functions to some extent as a code in a codified civilian system. By means of deductive reasoning a decision will be reached in the course of a process that stresses quite markedly the preference for statutory law.

Specifically, the underlying assumption echoes an idea that has been applied to the (unfulfilled) expectations of nineteenth century codifiers, that is, the "myth of codification."⁴⁹³ The ideal of codification was to regulate an area of the law in a complete and systematic way, with no gaps, overlappings, contradictions or

⁴⁹¹(1991) 13 EHRR 721, para. 69.

⁴⁹²Konrad Zweigert and Hans-Jürgen Puttfarcken, "Statutory Interpretation- Civilian Style", (1970) 44 TLR 704, 709.

⁴⁹³Genaro R. Carrió, "Judge Made Law under a Civil Code", (1981) 41 La. L. Rev. 993, 993.

ambiguities, all of which arguably made a code easy to apply. Although the situation in the system of the Convention is different (the ECHR does not have the comprehensiveness of any nineteenth century code nor it is subordinate to other higher laws in Strasbourg), and also, for the analogy with constitutional interpretation and judicial review as will be discussed later, at any rate, it is thought provoking to see in Strasbourg echoes of the (expansive) civilian methodology of interpretation which the stiffness of codification has prompted in civilian jurisdictions:

a code regulates a whole area of the law - such as private law, commercial law, or criminal law - and considering its coverage, is fairly short and concise. Normally, its language is general and very abstract, giving rise to a large amount of statutory construction. [This] is the basic reason that civil law rules of statutory interpretation show a pronounced tendency toward extending the scope of application of a statute rather than toward restricting it, a tendency reinforced by the fact that even the more specialized parts of a code are not kept up to date by the legislature.⁴⁹⁴

The Strasbourg system treats the ECHR and its Protocols as the treasure trove of all the statutory rules needed in decision making. This position at the highest point in the rank of sources is accordingly reminiscent of the role played by a Constitution for a Constitutional Court.

In addition, there is a secondary source of rules in Strasbourg: the major premiss also contains rules extracted in a civilian fashion from previously decided cases. That *jurisprudence*⁴⁹⁵ is an expanding body with a *de facto* persuasive (not binding) value. Even though today the practices of continental courts lead to results

⁴⁹⁴Konrad Zweigert and Hans-Jürgen Puttfarcken, *op. cit.*, 708.

⁴⁹⁵Frédéric Sudre, "Les libertés protégées par la Cour européenne des Droits de l'homme", in: Dominique Rousseau and Frédéric Sudre (eds.), Conseil Constitutionnel et Cour européenne des droits de l'homme: Droits et libertés en Europe, (1990), 17.

comparable to the common law doctrine of *stare decisis*,⁴⁹⁶ the important differences in the method of deriving and handling rules cannot be overlooked. In the common law world, the *ratio decidendi* is identified by studying the precedent (the entire previous decision) against the full facts of the case, and in some circumstances, a close similarity between the facts of the present case and the precedent is required. The underlying idea is that every court is bound by all decisions of superior courts; and until the mid-1960s, the doctrine also required in the United Kingdom that the Court of Appeal and the House of Lords treat their own previous decisions as absolutely binding.⁴⁹⁷ "Precedents" in the civil law world produce only a very general rule of law, however, usually not founded on recent leading cases (which, on the other hand, may only illustrate one aspect of a doctrine).⁴⁹⁸ For example, in Italy⁴⁹⁹, courts do not scrutinise whether the facts of the precedent and of case to decide are sufficiently similar. The different footing of the traditions was put, with lucidity, by Sir Otto Kahn-Freund⁵⁰⁰, as follows, "[The principle of precedent] differs from *l'autorité de la jurisprudence* in Continental countries, not because it permits and compels the courts to lay down legal rules - this they do everywhere - but because it refuses to permit the courts to change or to abrogate rules thus laid down." This should be handled carefully, with the caveat that the Strasbourg Court is at the top of the system, as a

⁴⁹⁶Konrad Zweigert and Hein Kötz, op. cit., 266.

⁴⁹⁷Practice Statement (Judicial Precedent) [1966] 3 All ER 77. The 1966 Practice Statement whereby the Lord Chancellor (Gardiner) announced that the House of Lords would regard itself as free to depart from its own previous decisions was an important change in the UK practices of precedents.

⁴⁹⁸Cf. T. B. Smith, *Studies Critical and Comparative*, (1962), 90, where doing otherwise in Scots law apparently gave *Donoghue v. Stevenson* a false common law pedigree of precedent to what was a Civilian doctrine.

⁴⁹⁹Robert S. Summers and Michele Taruffo, in: N. MacCormick and R. Summers, op. cit., 489.

⁵⁰⁰Sir Otto Kahn-Freund, "Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation", in: Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe*, (1978), 150.

Constitutional Court, and those Courts are more free to reverse themselves if need arises.

Nevertheless, that qualification voiced, we should not be prevented from noticing methodological⁵⁰¹ differences between the legal traditions in this respect. In Strasbourg the case law does not yield a *ratio decidendi* but a general statement similar to a statutory rule (the *ratio legis*⁵⁰² as it is termed in civilian countries) that buttresses rules already found in statutory form (ECHR). The rules found in previous cases are used sanitised of the facts, which makes for a weak control of the Court over future cases.

For example, in the *Case of Oerlemans v. the Netherlands*,⁵⁰³ where the "civil" character of the issue under Article 6 (1) ECHR was in dispute, there is no discussion on the facts of the precedents, just a brief reference to the *Skärby* and *Fredin* judgments from which the Court derived an applicable (abstract) principle. A "see, inter alia" suggests that there were other cases laying down the same rule, but those were omitted from the judgment.

The Government also pleaded, in the alternative, that there was no right of a "civil" character at issue.

However, in the light of the Court's case-law there can be no doubt that the property right in question was "civil" in nature within the meaning of Article 6 § 1 (see, inter alia, the above-mentioned *Skärby* and *Fredin* judgments, Series A no. 180-B, p. 37, § 29, and Series A no. 192, p. 20, § 63).

In sum, Article 6 § 1 applies to the present case.

⁵⁰¹Liana Fiol Matta, "Civil Law and Common Law in the Legal Method of Puerto Rico", (1992) 40 AJCL 783. That author has compiled several cases decided by the Supreme Court of Puerto Rico which confirm the methodological differences between the civil law (acquired through the Spanish influence) and the common law (through the American influence) in the handling of sources, style, interpretation and so on.

⁵⁰²Konrad Zweigert and Hans-Jürgen Puttfarcken, op. cit., 709.

⁵⁰³42/1990/233/299, paras. 47, 48 and 49. This case is discussed in Chapter 8.

Let us look at the case *Borgers v. Belgium* which set aside *Delcourt v. Belgium*⁵⁰⁴ based on the importance of the appearances of a fair trial. The rule extracted from the case law was that justice must not only be done, but must be seen to be done, however, it was cut off from the facts of the cited cases and deductively applied to *Borgers*.

It is, however, necessary to consider whether the proceedings before the Court of Cassation also respected the rights of the defence and the principle of the equality of arms, which are features of the wider concept of a fair trial (...). This has undergone a considerable evolution in the Court's case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice (see, among other authorities, mutatis mutandis, the following judgments: *Piersack v. Belgium* of 1 October 1982, Series A no. 53, pp. 14-15, § 30; *Campbell and Fell v. the United Kingdom* of 28 June 1984, Series A no. 80, pp. 39-40, § 18; *Sramek v. Austria* of 22 October 1984, Series A no. 84, p. 20, § 42; *De Cubber v. Belgium* of 26 October 1984, Series A no. 86, p. 14, § 26; *Bönish v. Austria* of 6 May 1985, Series A no. 92, p. 15, § 32; *Belilos v. Switzerland* of 29 April 1988, Series A no. 132, p. 30, § 67; *Hauschildt v. Denmark* of 24 May 1989, Series A no. 154, p. 21, § 48; *Langborger v. Sweden* of 22 June 1989, Series A no. 155, p. 16, § 32; *Demicoli v. Malta* of 27 August 1991, Series A no. 210, § 40; *Brandstetter v. Austria* of 28 August 1991, Series A no. 211, § 44).⁵⁰⁵

The case law was handled as *jurisprudence constante*. *Borgers* was not a trivial case where even a common law court would have only listed the cases to which it was adhering, but with this case, Strasbourg was reversing *Delcourt*. The citation was not part of any argumentation to explain the substantial aptness of the decision

⁵⁰⁴(1979-80) 1 EHRR 355. For further details on the *Delcourt* and *Borgers* cases see chapter 9.

⁵⁰⁵(1993) 15 EHRR 92, para. 24.

arrived at, rather, it merely yielded the principle (rule)⁵⁰⁶ and was quoted as a footnote. Underlying this method is the civilian jurists' assumption that by means of general and basic concepts⁵⁰⁷ - the outcome of a rationalisation and classification process - it is possible to get to grips with the chaos of human events. Those principles are usually best stated in statutory rules, but if extracted from case law, they are equally abstract and disconnected from any factual situation.

Let us now look at the cases quoted. There is no inductive inquiry into how the extracted rule was limited, extended or refined, and no tentative solution was devised, tested, and eventually, turned into the *Borgers* ruling. The factual diversity is striking, but since such assortment is confined to a parenthesis, it does not interrupt the terse style of the judgment. In *Piersack v. Belgium*⁵⁰⁸ the European Court found a breach of the fair trial principle of Article 6 (1) ECHR because the judge who presided over the court which convicted Mr. Piersack of murder had previously been the senior deputy *procureur* who took the decision to prosecute. In *Campbell and Fell v. the United Kingdom*⁵⁰⁹ the Court had found breaches of Articles 6, 8 and 13 ECHR as regards the restrictions imposed on prison inmates who sought, *inter alia*, legal advice concerning internal disciplinary proceedings. *Sramek v. Austria*⁵¹⁰ dealt with the right to a fair hearing of an American citizen whose purchase of land in the Austrian Tyrol was not authorised under existing national laws on grounds that apparently too many foreigners owned land in the region. The European

⁵⁰⁶Cf. Manuel Rodríguez Ramos, "Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico", (1948) 23 *Tulane Law Review* 1, 23, for an example in the opposite direction, product of the Anglo-American infiltration of the doctrine of *stare decisis* in the Puertorican legal system.

⁵⁰⁷Julio Cueto-Rúa, "The Future of the Civil Law", (1977) 37 *La. L. Rev.* 645, 646-7.

⁵⁰⁸(1983) 5 EHRR 169.

⁵⁰⁹(1985) 7 EHRR 165.

⁵¹⁰(1985) 7 EHRR 351.

Court found a breach of Article 6 ECHR because Ms. Sramek had not received a fair hearing before the Regional Real Property Authority but her monetary compensation claims were dismissed because there was no evidence that a differently composed authority would have decided in her favour. In the case of *De Cubber v. Belgium*⁵¹¹ the European Court found a breach of Article 6 (1) ECHR because one of the judges who convicted the applicant of forgery had previously been the investigating judge. In *Bönisch v. Austria*⁵¹² a domestic ruling was deemed in breach of the right to a fair hearing. The applicant had been found responsible for exceeding the tolerances for residual benzopyrene (a carcinogenic substance) in the meat smoking processes in use in his factory. The domestic decision was based on the evidence of a court-appointed expert who had previously drafted a report for the prosecution. In *Belilos v. Switzerland*⁵¹³ the European Court found that the Police Board of the Municipality of Lausanne, who had fined Ms. Belilos for participating in an unauthorised demonstration, was not an impartial tribunal as required by Article 6 (1) ECHR. In *Hauschildt v. Denmark*⁵¹⁴ the applicant had been convicted of breaches of financial laws as regards the flow of money between his company and associated companies abroad. The Court found violations of Article 6 ECHR because some of the judges involved in the conviction had previously participated in various pre-trial decisions. In *Langborger v. Sweden*⁵¹⁵ a violation of Article 6 (1) had occurred because the tenant applicant had not had a fair hearing concerning changes in his lease agreement. In *Demicoli v. Malta*⁵¹⁶ there was a breach of Article 6 ECHR as regards the impartiality of

⁵¹¹(1985) 7 EHRR 236.

⁵¹²(1987) 9 EHRR 191.

⁵¹³(1988) 10 EHRR 466.

⁵¹⁴(1990) 12 EHRR 266.

⁵¹⁵(1990) 12 EHRR 416.

⁵¹⁶(33/1990/224/288)

the proceedings for defamation against Mr. Demicoli, editor of a political satirical periodical. Finally, in *Brandstetter v. Austria*⁵¹⁷ the handling of evidence was in breach of Article 6 (1) ECHR.

Running through all this heterogeneous collection of criminal offences, administrative violations and complaints against unfair administrative procedures, then, is the one common feature: in one way or another they all fell short of the requirements of a right to a hearing and/or impartial tribunal which are important for the appearance of a fair trial. It is left to the hypothetical readers the task to work out for themselves the reasoning of the Court, as they are asked to "see, among other authorities" and to keep in mind that all the cases are to be read *mutatis mutandis*. The reasons for choosing those "precedents" is not really made explicit. The lack of substantiation makes it difficult to study, for example, how the Court measures the elements resorted to in deciding the scope of the margin of appreciation:

Especially vexing in any attempt to uncover the meaning of the consensus factor is the consistently unsubstantiated nature of the Court's pronouncements. Each of these opinions relies upon the precedential value of other opinions in which a European consensus, or lack thereof, figured importantly, but a student of the Court is not informed as to how the Court measures the existence or non-existence of any one particular consensus.⁵¹⁸

Finally, the *jurisprudence constante* in Strasbourg, in contrast with the common law principle of precedent, can only keep a weak control over future decisions.⁵¹⁹ Where the margin of appreciation afforded to the member states

⁵¹⁷(1993) 15 EHRR

⁵¹⁸Howard C. Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence", (1987) 3 Connecticut Journal of Int'l Law 111,158.

⁵¹⁹Cf: "Statutory interpretation in Italy", in: N. MacCormick and R. Summers, op. cit., 241, where a system not based on legally binding precedents seems unable to prevent inconsistent case law on the same issue.

is substantial, the possibility of contradictory findings that are "good law" at the same time cannot be ruled out. For example, in *Cossey and Rees v. United Kingdom* the European Court decreed, *inter alia*, that the right to marry was subject to national laws, which in the United Kingdom banned marriage between persons of the same biological sex at birth, but in *B. v. France* the Court decided otherwise due to differences in domestic law. As a result,

the *Cossey* decision is not completely redundant. A difference in domestic laws meant that the court could neatly distinguish the situation of transsexuals in the two countries. Only if the court had decided B.'s case on new scientific evidence or social grounds would *Cossey* no longer stand. It therefore remains "good law," at least as far as transsexuals in the United Kingdom are concerned.⁵²⁰

In addition, the Court appeared to have used "political antennae" not to ask a member state to carry out (perhaps extensive) changes in its administrative law system.⁵²¹

The Court's methodology of interpretation of the rules in the "statute book" of the ECHR

The old positivist idea that deciding a case involves nothing more than "applying" a rule to the facts that still pervades judicial thought in many continental countries⁵²² appears to have percolated through to the European Court, where much heed is paid to the statutory text, as shown by the hierarchy of sources in use. This section of the chapter deals with a range of issues on interpretation of statutory rules in Strasbourg. It will

⁵²⁰Susan Millns, "Transsexuality and the European Convention on Human Rights", [1992] PL 559, 564.

⁵²¹More on this in Chapter 8.

⁵²²Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, (1987), 272.

highlight the inadequacy of methods of statutory interpretation that concentrate on the statutory texts alone because, here again, the ECHR as a Constitution, is written in open-ended language for which teleological arguments are helpful. Elements for the analysis will be drawn from statutory interpretation in domestic law and from interpretation elsewhere, however, as the environment where the ECHR operates is different from those, the differences are predominant.

For the sake of discussion, interpretation will be divided in three levels, textual, contextual and beyond those two, the use of other arguments of interpretation. Although those three levels will be dealt with separately, they are at the same time, ingredients of one total process of construction which has been divided only to facilitate the analysis. In (almost) no case is the distinction hard and fast.

The first of the three levels is the textual or linguistic, which seems particularly important in statutory interpretation in common law countries.⁵²³ In the civil law, the plain meaning rule or "*sens clair*" has much the same meaning and has fallen into disfavour although in practice it may reappear now and then.⁵²⁴ It examines the rules according to the ordinary meaning of words, except if there are grounds for taking the words as being part of a specialist terminology, which then should apply. Thus, to construe a provision of the ECHR or its Protocols, the European Court should start from the text of the ECHR and give words their everyday meaning. Let us consider a few examples. The clarification of the meaning of the word "necessary"

⁵²³N. MacCormick and Z. Bankowski "Some Principles of Statutory Interpretation" in: Jan van Dunné (ed.) Legal Reasoning and Statutory Interpretation. Rotterdam Lectures in Jurisprudence 1986 - 1988, (1989), 46 to 53.

⁵²⁴Konrad Zweigert and Hans-Jürgen Puttfarcken, op. cit., 713.

within Article 10 ECHR was done in the case *Engel and Others v. the Netherlands* (No. 1),⁵²⁵ in which the Court interpreted the phrase "right to liberty" of Article 5 ECHR. In this case the five applicants were draftees in the Dutch armed forces and on a number of occasions had been subject to various penalties for offences against military discipline. The Court said:

(...) In proclaiming the 'right to liberty', paragraph 1 of Article 5 is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. (...) As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (...) This is clear both from the use of the terms 'deprived of his liberty' 'arrest' and 'detention', which appear also in paragraph 2 to 5, and from a comparison between Article 5 and the other normative provisions of the Convention and its Protocols.

Periodically though, the Court has to bring out the meaning of words after a study of the two authentic texts of the ECHR, English and French. The *Golder* case depicts a struggle with both languages which were out of step on the expression "independent and impartial tribunal established by law" of Article 6 (1) ECHR:

The clearest indications are to be found in the French text, first sentence. In the field of *contestations civiles* (civil claims) everyone has a right to proceedings instituted by or against him conducted in a certain way - 'équitablement' (fairly), 'publiquement' (publicly), 'dans un délai raisonnable' (within a reasonable time), etc. - but also and primarily 'à ce qui sa cause soit entendue' (that his case be heard) not by any authority whatever but 'par un tribunal' (by a court or tribunal) within the meaning of Article 6 (1) (...) The English text, for its part, speaks of an 'independent and impartial tribunal established by law' (...) ⁵²⁶

⁵²⁵(1979-80) 1 EHRR 647, para. 58.

⁵²⁶(1979-80) 1 EHRR 524, para. 32.

Those difficulties of non-equivalence between the English and French texts were predictable. H. P. de Vries⁵²⁷ wrote that it is with the Italians that the French share a *lingua franca* of concepts, reasoning, analysis of problems, and so on due to the important French influence on the Romanic family within the civilian tradition. Moreover, J. F. Nijboer made the interesting observation that there is a gulf between the language on evidence and proof in English and in other continental European languages:

*The English language has much more variation and precision (refinement) in the field of evidence and proof than the continental languages. On the other hand, there are many more abstract, substantive legal concepts that can easily be translated, for example, from German into Spanish, French or Dutch, but that do not have a current equivalent in the English language.*⁵²⁸

Whenever the words cannot yield a meaning, an option is to look on the context surrounding a rule as a source of arguments that give meaning to a rule within a legal system. In a study of statutory interpretation in various countries, although it was said that in civilian jurisdictions the *jurisprudence* fixes to a considerable extent the meaning of the codes, it was observed, however, that systemic arguments were widely used except in common law jurisdictions such as the United States and the United Kingdom, where, "if a statute is not by its terms applicable, courts frequently assume that any prior law continues to control, or that the matter is left to the common law decision making, and refuse to apply the statute by analogy."⁵²⁹

⁵²⁷Henry P. de Vries, Civil Law and the Anglo-American Lawyer : A case-illustrated introduction to civil law institutions and method, (1976), 5.

⁵²⁸J. F. Nijboer, "Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective" (1993) 41 AJCL 299, 304.

⁵²⁹Robert S. Summers and Michele Taruffo, "Interpretation and Comparative Analysis", in N. MacCormick and R. Summers (eds.), op. cit., 471.

In Strasbourg, the use of interpretative methods centred on the ECHR as a system (using legal analogy, for example) reflects the preference for legal reasoning based if possible on the text of the ECHR. On occasion, rules can be drawn more narrowly from the most immediate context of the provision being interpreted or, looking for a wider setting, rules can be drawn from the whole of the ECHR as an integral system.⁵³⁰ Let us turn our attention to two examples. An expression was found to have a particular meaning within the ECHR in *The Sunday Times* case. The Convention was treated as a coherent context in which certain expression made sense, "(...) the Court emphasises that the expression "authority and impartiality" of the judiciary has to be understood within the meaning of the Convention. For this purpose, account must be taken of the central position occupied in this context by Article 6, which reflects the fundamental principle of the rule of law"⁵³¹, or in the *Golder* case when it observed that the expressions set out in the ECHR are part of a context of which the Preamble is also a piece, "As stated in Article 31 (2) of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble generally is very useful for the determination of the "object" and "purpose" of the instrument to be construed."⁵³²

Nevertheless, the textual and contextual approaches to interpretation are insufficient: the Preamble mentions some purposes of the human rights system.⁵³³ This basic philosophy enables Paul Mahoney to reject the possibility of an evolution towards a lower, as opposed to a higher,

⁵³⁰J. Bengoetxea and H. Jung, "Towards a European Criminal Jurisprudence? The Justification of Criminal Law by the Strasbourg Court", (1991) Legal Studies 230, 262.

⁵³¹(1979-80) 2 EHRR 245, para. 55.

⁵³²(1979-80) 1 EHRR 524, para. 34.

⁵³³The Preamble, linking the ideas of democracy and the protection of human rights, states that "the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms."

level of human rights protection.⁵³⁴ Like a Constitution, the ECHR, "(...) was clearly not intended to last for only a day, but to provide for future generations the kind of continuing protection that a national constitution provides for individual liberty."⁵³⁵ The ECHR, as a Bill of Rights, does not follow the model of minute regulation typical of statute law in the common law world⁵³⁶ and it becomes necessary to turn to teleological and purposive interpretations, and this has been recognised in Strasbourg when they speak of "the ECHR as a living instrument" and seek guidance from the purposes of the system. The case law supports this view, for example, *The Sunday Times* case⁵³⁷ stated that teleological arguments drawn from the explicit or implicit objectives of the ECHR and its Protocols may help to clear up differences in meaning between the two versions as regards the expression "prescribed by law" ("*prévues par la loi*").⁵³⁸

Specifically, a methodological problem well known in domestic law arises whenever a judge is asked to construe open-ended expressions. In this particular sense a supranational document such as the ECHR can be compared to any statute with expressions such as "*ordre public*", "*morals*" and the like, as for both the question of interpretation is whether or not it is necessary to conjure up the spirit of the law-givers to find the appropriate meanings. Writing on statutory interpretation, Ronald Dworkin⁵³⁹ rejected the "speaker's

⁵³⁴Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin", (1990) 11 HRLJ 57, 67.

⁵³⁵Paul Mahoney, *op. cit.*, 64.

⁵³⁶J. G. Merrills, *op. cit.*, 78.

⁵³⁷For a discussion of this case and the differences between the legal traditions as regards the notion of "law" see chapter 8.

⁵³⁸(1979-80) 2 EHRR 245, para. 48: "Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that it reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty."

⁵³⁹Ronald Dworkin, *Law's Empire*, (1986), 320.

intent" technique that propounds that meaning comes exclusively from the author because it is uncertain how to determine the appropriate intent in hard cases: whose intentions of those voting for a bill are to be consulted, the overall average?, the majority?, a plurality?⁵⁴⁰ and worse, if the issue to be adjudicated upon is not covered by a statute, then information on how the legislator would have resolved it is almost impossible to find. As regards the ECHR this issue could be put as to whether interpretation should follow historical or updating standards. In Dworkin's statutory interpretation, construction is performed as if the author of a statute and the interpreter engaged in a dialogue. A "constructive interpretation" takes place⁵⁴¹ because the interpreter simultaneously sticks to the text and supplies meaning if it is absent or has been misunderstood by the author.⁵⁴² The European Court appears to follow in the steps of Dworkin's judge Hercules, who "does not amend out-of-date statutes to suit new times, as the metaphysics of speaker's meaning would suggest. He recognizes what the old statutes have since become."⁵⁴³

Let us look at an example in ECHR law. The expression "inhuman or degrading treatment or punishment" set out in

⁵⁴⁰Incidentally, it is interesting to note that the traditional United Kingdom position that courts may not resort to the debates of Parliament reported in *Hansard* as an aid to the interpretation of statutes was changed by *Pepper (Inspector of Taxes) v. Hart*, [1993] 1 All ER 42.

⁵⁴¹In *Law's Empire*, Dworkin wrote at page 52: "Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."

⁵⁴²Ronald Dworkin, op. cit., 55-56. A "constructive interpretation" is then closer to an "artistic interpretation." As an example, he described how Shakespeare would have liked the character of Shylock to be played in a current production, where the producer, "must find a conception of Shylock that will evoke for a contemporary audience the complex sense that the figure of a Jew had for Shakespeare and his audience, so his interpretation must in some way unite two periods of "consciousness" by bringing Shakespeare's intentions forward into a very different culture located at the end of a very different history. If he is successful in this, his reading of Shylock will probably be very different from Shakespeare's concrete vision of that character."

⁵⁴³Ronald Dworkin, op. cit., 350.

Article 3 ECHR can be given very different meanings: is it the understanding at the time of the ECHR's signature or, on the contrary, an updated one? Ruling for the applicant in *Tyrer v. United Kingdom* the European Court held that sentencing a young offender to a birching punishment in the Isle of Man amounted to a violation. Employing the technique of evolutive interpretation,⁵⁴⁴ the European Court applied contemporary notions, played down the relevance of local traditions, and found that the breach had taken place for the reason that "(...) the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of the present day conditions (...)." ⁵⁴⁵ Although the answer given may raise further questions of, for example, judicial policy or perhaps whether the Court moved too far too soon, it brings home the perception that the European Court matches a Constitutional Court. Further, the *Tyrer*⁵⁴⁶ case mirrors concepts of the United States Constitution such as "cruel and unusual punishment" which - in Ronald Dworkin⁵⁴⁷ words - are not (historically specific) conceptions. Since the Constitution is made up of concepts and not of conceptions, the historically specific conceptions of the framers can be disregarded.

At this point, a word about interpretation and drafting. Although the drafting of the ECHR was influenced by the United Kingdom (whose delegates insisted on the incorporation of more detail to the text), the interpretation of the ECHR in Strasbourg does not bear many similarities with statutory interpretation in a common law jurisdiction. Not only because the typical form of reasoning in the common law is reasoning by

⁵⁴⁴Paul Mahoney, *op. cit.*, 61.

⁵⁴⁵(1979-80) 2 EHRR 1, para. 31.

⁵⁴⁶For further details on this case see chapter 7.

⁵⁴⁷Ronald Dworkin, Taking Rights Seriously, (1981), 134.

reference to precedent,⁵⁴⁸ but because the literal meaning of a (usually very detailed) statute is the first concern of any British court despite more sympathy towards purposive interpretations in recent times.⁵⁴⁹ On the other hand, the ECHR cannot be compared to a code in a codified civilian jurisdiction - although, as seen, code and ECHR share a few characteristics. Nor can it be entirely compared with a statute (in the civil or common law worlds) despite the fact that a few thoughts on statutory interpretation were useful to understand the work of the European Court. The closest comparison is, therefore, with the Constitution because constitutional texts need updating interpretation to become applicable.

The *Tyrer* case has not been the only one where such actualising approach has been resorted to, and there have been other cases dealt with in similar fashion. In *Marckx v. Belgium*⁵⁵⁰ the distinction between legitimate and illegitimate family, which had been a typical feature of the civilian legal tradition for so long, was found discriminatory and in breach of Articles 8 and 14 ECHR. Likewise, illuminated by current conditions, the Court found the criminal laws in Northern Ireland prohibiting homosexual acts in private between consenting male adults to be in breach of the ECHR, because "the Court cannot overlook the marked changes that have occurred in this regard in the domestic law of the Member States"⁵⁵¹

⁵⁴⁸M. A. Eisenberg, *The Nature of the Common Law*, (1988), 52. The continued application in new cases of a rule adopted in a precedent can be rationalised, however, on grounds very different from those employed in the precedent itself.

⁵⁴⁹P. S. Atiyah, "Common Law and Statute Law", (1985) 48 MLR 1. As an (old) example of analogical interpretation in English law, the article mentions the *Edison Telephone Co* case of 1880 [1880] 6 QBD 244, in which it was held that a telephone conversation was a telegram transmitted by telegraph within the meaning of the Telegraph Act 1869.

⁵⁵⁰(1979-80) 2 EHRR 330. The Court acknowledged that "at the time when the Convention (...) was drafted, it was regarded as permissible and normal in many European countries to draw a distinction (...) between the 'legitimate' and 'illegitimate' family."

⁵⁵¹(1982) 4 EHRR 149, para. 60. See further discussion of this case in chapter 7.

Over and above these considerations, any court has to find a balance between opposing interests, views and readings of rules, and the Strasbourg Court is no exception. Moreover, a particular difficulty in the work of the Strasbourg Court is that the meanings it gives to the Convention law should, as far as possible, be able to "travel" to a variety of legal systems which are to be treated equally. Teleological arguments are helpful to measure the behaviour of the different governments to the same standards as they help to find general principles which can be shared. For example, to open the way for the Court to offer a guarantee of procedural due process also in administrative proceedings, a new reading of Article 6 ECHR had to extend the due process clause beyond the area of cases strictly involving criminal charges. The expression "the determination of civil rights and obligations" was treated as "autonomous", that is, independent from any other legal system. A line of case law started with *Ringeisen (No. 1)*⁵⁵², where the applicant received the protection of the ECHR after having sold and accepted payment for a number of plots of land and found that the Austrian District and Regional Real Property Transactions Commission would not approve the sale. Another example, in the same line of case law, is *König*.⁵⁵³ It concerned the withdrawal - also through administrative proceedings - of the authorisation to practice medicine and run a clinic enjoyed by a German doctor. The Court decided that the proceedings in question were related to civil rights and obligations because the relationship doctor-patient was contractually based and consequently, private. Therefore, the complainant's rights were protected.

Yet not all the judges shared in the adopted teleological construction. In a dissenting opinion, Judge Matscher

⁵⁵²(1979-80) 1 EHRR 455, para. 94.

⁵⁵³(1979-80) 2 EHRR 170.

cast a negative light on the actual teleological interpretation carried out expressing concern over straying into judicial legislation.⁵⁵⁴ Likewise, Judge Sir Gerald Fitzmaurice's dissent in the *Golder* case reflects fears of the Court's "trespassing on the area of what may border on judicial legislation"⁵⁵⁵ when reasoning against the majority's teleological reading of Article 6 (1). In another dissenting opinion, Sir Gerald described the evolutive interpretation performed in *Marckx* as "virtually an abuse of the powers given to the Court." In addition to recognising the need for a purposive interpretation, however, the European Court has said that a strict construction should be normally reserved to finding the limits to the exercise of rights and freedoms.⁵⁵⁶

Minor premiss

Once the meaning of the applicable articles has been established through interpretation and the rules had been set out in a major premiss, then the Court is ready to proceed to the subsumption of the facts into the law.⁵⁵⁷ Subsumption means that the rules take the facts on board. The Court chooses the relevant facts in order to shape, not their substance but their format, to what the categories of the rule need in order to apply. In this the legal traditions move in opposite directions, since the common law tends to reason from the facts of the case.⁵⁵⁸

⁵⁵⁴(1979-80) 2 EHRR 170, dissenting opinion at page 207. (paras. not numbered)

⁵⁵⁵(1979-80) 1 EHRR 524, dissenting opinion at page 548. (para. 2)

⁵⁵⁶W. J. Ganshof van der Meersch, "Les méthodes d'interprétation de la Cour européenne des droits de l'homme" in: Daniel Turp and Gerald A. Beaudoin, Perspectives canadiennes et européennes des droits de la personne: Actes des Journées Strasbourgeoises de l'institut Canadien d'études juridiques supérieures 1984, (1984), 195.

⁵⁵⁷J. Bengoetxea and H. Jung, op. cit., 258.

⁵⁵⁸Stressing the arguments, F. J. Nijboer, op. cit., 320, pointed out that reasoning in both traditions is reversed: the Anglo-American tradition starts with an establishment of the facts to reach from there the application of substantive provisions and concepts while the

Let us see an example. In the case of *Moreira de Azevedo*, the Court started with more general ideas and concepts which were laid down in the major premiss. The legal rule (Article 6 (1) ECHR), laid out in universal terms, contains a description of legal facts which are relevant to provoke the consequences also formulated in the rule.⁵⁵⁹ Starting from there, the Court subsumed the facts, that is, adapted their format to fit into a conception of what is required for the application of the consequences set down in the rules stated in the major premiss. In the case of the example, the European Court deemed the ECHR applicable to Portugal as a High Contracting Party:

(...) The Court notes that the incident in question took place on 23 January 1977 and that the accused was arrested and interviewed on the same date. However, the period to be considered did not begin to run at that date, but on 9 November 1978, when the Convention entered into force with regard to Portugal (...)⁵⁶⁰

Then, the Court pointed out that there was a controversy between an individual and a government:

(...) According to the Government, Mr. Moreira de Azevedo did not take the steps necessary to expedite the proceedings and displayed a passivity which reflected acceptance of their length. This the applicant disputed (...)⁵⁶¹

Finally, the violation in question fit into a category defined in the ECHR: the Court found that the factual situation disclosed a breach, which took place because the case was not heard within a reasonable time:

Continental starts with the general ideas and concepts and from there adapts the facts into what the law requires as factual premisses for the application of the law.

⁵⁵⁹The process of subsumption in the ECJ is described in: Joxerramon Bengoetxea, "The Justification of decisions by the European Court of Justice", (1990), 12, European Jurisprudence, papers of the Europa-Institut, Universität des Saarlandes.

⁵⁶⁰(1991) 13 EHRR 721, para. 70.

⁵⁶¹(1991) 13 EHRR 721, para. 72.

(...) By requiring that cases be heard "within a reasonable time", the Convention stresses the importance of administering justice without delays which might jeopardise its effectiveness and credibility (...)⁵⁶²

Although in an actual judgment the issues "As to the facts" are placed before the issues "As to the law" the reasoning in Strasbourg starts from the rules, because the "facts" are pigeonholed in the categories of the "law." Under the sub-title "As to the facts", the Court addresses "The particular circumstances of the case" and the applicable municipal law under the label "Relevant domestic law and practice". National statutes, along with national case law, are dealt with as an issue of fact, as they show evidence of the state of the law in the member state whose conduct is being examined as regards an alleged breach of the ECHR. This is the usual practice of international courts.⁵⁶³ Usually the origin of a violation of the ECHR can be traced to the existing legislation or case law of a member state, the absence of legislation protecting a right, or perhaps a decision of a state authority in the application of an existing law, although the law itself might not be challenged.⁵⁶⁴

The Court also makes a reference to the "Proceedings before the Commission." There is no substantive discussion of the correctness of the judgment, however, the tone throughout the "As to the facts" section is that

⁵⁶²(1991) 13 EHRR 721, para. 74.

⁵⁶³A decision of a court or a legislative measure may constitute evidence of a breach of the ECHR and thus generate responsibility for the respondent state. In general, the concept of "municipal law as mere facts" is, however, a complex issue in public international law, since various other questions are involved: it may be necessary to prove and hear evidence on municipal law, the international court may undertake its own researches, the interpretation of municipal law by national courts is binding on the international tribunal (in order to avoid contradictory versions of the law in a state from different sources), however, international courts cannot declare the internal invalidity of municipal law, and so on. For further details, see: Ian Brownlie, Principles of Public International Law, (1990), 40.

⁵⁶⁴As an example of this see the case *Gillow v. United Kingdom* (1989) 11 EHRR 335, dealt with in Chapter 7.

of mentioning the factual circumstances of the case to which the law of the ECHR will apply.

Take another example, in *Windisch v. Austria* the Court objected to the handling of the evidence on which the applicant had been convicted. The facts of the case which disclosed unacceptable constraints on the applicant's defence were placed in two categories of Article 6 ECHR: para. 3 (d), concerning the examination of witnesses and para. 1, regarding the requirements of a fair trial. Finally, the Court asserted that: "In this circumstance, the use of this evidence involved such limitations on the rights of the defence that Mr Windisch cannot be said to have received a fair trial. There has been a violation of paragraph 3 (d), taken together with paragraph 1, of Article 6."⁵⁶⁵

⁵⁶⁵(25/1989/185/245) 27 September 1990, at 8.

**The test of government behaviour that takes place
in the minor premiss**

Insofar as a member state behaviour is measured against a supranational law, the assessment of whether the factual situation discloses a breach of the ECHR suggests a degree of judicial review of government action. The European (supranational) organs put limits to the governmental powers of the member states in the area of human rights guided by rules set down in a supranational bill of rights. The conclusion that this practice amounts to a transnational system of judicial review follows the line of argument advanced by Professor M. Cappelletti: "The "transnational" character of judicial review is revealed here not only by the fact that the review is based on a transnational bill of rights - the European Convention - but also by the further fact that the adjudicative bodies are themselves transnational in nature."⁵⁶⁶ In general, judicial review requires a higher law against which (hierarchically inferior) legislation or other measures are gauged. The ECHR, like a Constitution, is the higher law in the Strasbourg system, whose values are being ultimately upheld by the European Court, carrying out activities akin to the judicial review performed by a constitutional court in a domestic jurisdiction.⁵⁶⁷ In this sense, the ECHR system "represents a striking combination of elements inherent in, or analogous to, both constitutionalism and federalism because the rationale of the protection of a higher law is transposed onto a transnational - if not federal - level."⁵⁶⁸ Dominique Rousseau wrote that the challenge for Strasbourg was "the creation of a European charter of

⁵⁶⁶Mauro Cappelletti, "The "Mighty Problem" of Judicial Review and the Contribution of the Comparative Analysis", (1980) 53 Southern California Law Review 409, 429.

⁵⁶⁷Rolv Ryssdal, The future of the European Court of Human Rights, European Court of Human Rights: Report # ECOUR90296.AB (1990), 1.

⁵⁶⁸Mauro Cappelletti, op. cit., 432.

human rights through the emergence and development of a European constitutional jurisdiction."⁵⁶⁹ The complexity of the environment where the Court interprets and applies the ECHR brings up the issue of the differences in the municipal law of the member states, particularly important when different legal traditions are involved.⁵⁷⁰

Not only does the European Court carry out judicial review but likewise, the issues adjudicated upon are similar to those decided by a constitutional court, and even its justificatory practice in this respect seems closer to such courts (or to the ECJ) than to the International Court of Justice which abides by the restrictive interpretation of public international law.⁵⁷¹ Could the European Court be a target of the criticisms that the Convention has left too much power to define the open-ended clauses of the ECHR in its hands? What about the legitimacy of the adjudicator in relation to a "counter-majoritarian"⁵⁷² nature of judicial review? It has been said that "(...) today everyone seems to agree in theory that constitutional adjudication generally is judicial policy-making, is choice among or allocation of competing constitutionally recognized values; hence the need to justify and legitimize their nature and rank."⁵⁷³ It may be said, as it has been expressed on the further capabilities of disinterested perspectives of the United States Supreme Court justices as compared to other organs of power "because they are not electorally accountable, or as subject to interest group pressures as elected

⁵⁶⁹Dominique Rousseau, "Vers un ordre juridictionnel européen des droits et libertés? L'intégration européenne des Droits de l'homme au bloc de constitutionnalité", in: Dominique Rousseau and Frédéric Sudre (eds.), Conseil Constitutionnel et Cour européenne des droits de l'homme: droits et libertés en Europe, (1990), 130.

⁵⁷⁰This issue will be dealt with in chapters 7 to 10.

⁵⁷¹J. Bengoetxea and H. Jung, op. cit., 268.

⁵⁷²Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, (1962), 16.

⁵⁷³Knud Krakau, "Liberal and Conservative Criticism of Judicial Review in the United States and Germany" in: H. Wellanreuther (ed.), German and American Constitutional Thought, (1990), 395.

officials are, or dependent on others, or, as a general proposition, looking to advancement."⁵⁷⁴ It may be easier to justify the settlement of disputes by non-elected judges, however, if the topic is analysed from the point of view of Dworkin's rights thesis. He distinguishes principles, which are propositions that describe rights, from policies, which describe goals.⁵⁷⁵ In his view, judicial decisions in civil cases are and should be generated by principles and not policies. When judges weigh an individual's right, that right is not measured against the community's good (policies) but against the rights of others (rights). In hard cases, then, the reasoning in Strasbourg could be described as about rights and not about policies. Even in those cases where lawyers disagree as to the outcome, the judge has no discretion, and although the answer might be difficult to find or judges might err, there is always one right answer. In Strasbourg, this opinion may help to encourage the Court to anchor the justification in the argumentation of the judgments themselves and to rely less on the deductive model of justification.

On the other hand, it may also help the European Court's development to think of the symbolic power of review under a Bill of Rights which in the eyes of Western democracies outweighs concerns about losses of sovereign power.⁵⁷⁶ In the Council of Europe system there is an underlying political value in the institution of judicial review, and of the member states "being watched" by a supranational organism. This can be inferred from its growing membership, absence of withdrawals, the expansion of the list of rights protected, the addition of

⁵⁷⁴Harry W. Wellington, Interpreting the Constitution: The Supreme Court and the Process of Adjudication, (1990), 30.

⁵⁷⁵Ronald Dworkin, Taking Rights Seriously, op. cit., 82.

⁵⁷⁶Philip Zylberberg, "The Problem of Majoritarianism in Constitutional Law: A Symbolic Perspective", (1992) 37 McGill L. J. 27, 69.

Protocols and so on.⁵⁷⁷ Perhaps this realisation may diminish the need of resorting to its "political antennae" in order to avoid putting governments in an impossible position, or to justify its judgments deductively. As Joseph Story wrote last century that a non-restrictive interpretation of the American Constitution "(...) can never be a matter of just jealousy; because the rulers can have no permanent interest in a free government, distinct from that of the people, of whom they are a part, and to whom they are responsible."⁵⁷⁸ Less stress on the deductive style of the judgments (with all their consequences) may strengthen the position of the European Court as an oracle of human rights law in Europe. It would bring the justification (through a discussion of the aptness of the decision taken) to the judgments themselves. John Philip Dawson had argued, for example, that in Rome, neither the praetors (magistrates) nor the *iudices* (judges) were the oracles of the law because the reasons for their judgments have not been preserved and as a consequence, the jurists were the oracles.⁵⁷⁹

Conclusion of the syllogism

The process of logical deduction started with the major premiss (rules), was followed by a minor premiss (facts) and culminated in a conclusion ("For these reasons, the Court ..."), where the Court spelled out in a ruling the results of the subsumption. More importantly, the conclusion appears as the result of logical deduction. There is a parallel with the ECJ here. It has been pointed out that the ECJ, keen on appearing as a non-

⁵⁷⁷Philip Zylberberg, *op. cit.*, 72.

⁵⁷⁸Joseph Story, Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution, (1858) 3rd. ed., volume I, Book III, Chapter V (§ 413), 293.

⁵⁷⁹John Philip Dawson, The Oracles of the Law, (1968), 106-7.

political organ, "has carefully crafted its opinions to present the results in terms of the inexorable logic of the law."⁵⁸⁰ In our example of the *Moreira de Azevedo* case, the conclusion that a "reasonable time" was exceeded, that the facts could be pigeonholed in a category of the ECHR and therefore produced a breach of Article 6 (1) ECHR, was spelled out in the the *dispositif*, as follows:

For these reasons, the Court unanimously:

1 - Dismisses the Government's preliminary objection;

2 - Holds that Article 6 § 1 applied to the present case and that it was violated ; (...)

Accordingly:

(...)

(b) invites the Government and the applicant to submit to it writing within the next three months their observations on the question and in particular to communicate to it any agreement they may reach;

(c) reserves the subsequent procedure and delegates to the President of the Court power to fix the same if need be.⁵⁸¹

If, as a result of the subsumption the Court finds that the consequences formulated in the rule (major premiss) are not applicable, then the ruling will be of non-violation of the ECHR. For example Article 6 was found not to have been breached in *Oerlemans v. the Netherlands*⁵⁸² and the Court stated that as follows:

C. Conclusion

58. Accordingly, there has been no violation of Article 6 § 1.

FOR THESE REASONS, THE COURT

Holds unanimously that there has been no violation of Article 6 § 1 of the Convention. (...)

⁵⁸⁰ Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration", (1993) 47 International Organization 41, 70.

⁵⁸¹ (1991) 13 EHRR 721.

⁵⁸² 42/1990/233/299, para. 58.

The pronouncement by the Court, as the final part of the judgment, reveals the compact and concise style in both the surface and the underlying patterns of reasoning, although the present Strasbourg judgments tend not to be magisterial and brief as, for example, those of the French courts. It also marks the culmination of a process guided by "narrative coherence"⁵⁸³ where the Court tried to make sense of all the facts and applied the law to them.

Conclusions

This chapter examined the interpretation of the Convention within an analysis of the style of the judgments of the European Court. One of the purposes was to set the scene for further comparative studies on the adjudication and interpretation processes in the next chapters. Ordinary statutes and Constitutions do not convey their respective meanings in identical ways. The interpretation of Convention law was compared to statutory interpretation in domestic law, to code interpretation in a civilian jurisdiction, and finally, which appeared as the most satisfactory, to constitutional interpretation. To begin with, and not surprisingly, the ECHR appeared at the highest point in the hierarchy of norms used in Strasbourg. Further, a particular style of *jurisprudence* is developed by the European Court, which reveals its preference for statutory law, partly because the Court itself is the creature of statute but also because all the validity of

⁵⁸³What D. Neil MacCormick names "*narrative coherence*" is a test of truth or probability in questions of fact and evidence upon which proof by direct observation is not available. "(...) we treat the natural world as explicable in terms of explanatory principles ('laws') of causal and probabilistic kind, and the world of human affairs as being explicable in terms of explanatory principles of a rational, intentional and motivational as well as causal and probabilistic kind.", D. Neil MacCormick, "Coherence in Legal Justification", in: Theorie der Normen, (1984), 48.

the human rights system rests ultimately on the the ECHR and its Protocols. A body of case law is being developed at the supranational level and it absorbs legal approaches and principles from many diverse legal systems. Paradoxical though it may seem, the case law's deductive style weakened, in part, the position of the Strasbourg Court in the system of the Convention. The way judgments are argued shows that the Court clings to a deductive model that shifts justification to the Convention's rules instead of relying on substantive arguments set down in the judgment itself. If compared to common law judgments, they tend to be under argued, and this is particularly noticeable in view of the absence of an A-G in the style of the ECJ. The continental influence on the European Court and the way the procedure is organised⁵⁸⁴ lead to the adoption of a deductive model that shifts the rationality of the judgments from the text of the decision to the ECHR. Judgments appear as an inexorable deduction made from the text of the Convention. This situation comes into view also by contrasting the judgments and those separate decisions that defy this situation with a different model of justification. The passage of time, the increase of the case law and possibly the incorporation of elements of the weighing model in the decisions will determine that the Court may eventually overcome some of the limitations of the deductive approach. For the time being, the cases reviewed showed that the European Court handled its own case law as *jurisprudence constante*⁵⁸⁵ rather than the common law *stare decisis*. This approach provides for a weak control over future decisions, and this, in turn may impose some limitations on the effect of the system of the ECHR on the harmonisation of European law and perhaps also the aspiration of the Court

⁵⁸⁴This aspect was discussed in the previous chapter.

⁵⁸⁵In a manner comparable to the development of the *jurisprudence* by the French Council of State.

of becoming the oracle of European human rights law. All these elements pull interpretation in the direction of diversity.

Nevertheless, there are elements moving in the opposite direction. A constitutional role for the European Court was found in the judicial review of member state behaviour, and in such circumstances it appeared that the rationale of protection provided by a higher law in domestic law has been transposed onto a supranational level. There is value in the institution of judicial review, and of the member states "being watched" by a supranational organism. In addition, the adjudication of a supranational Bill of Rights written in open-ended language and conceived to last for future generations requires the use of teleology in order to provide the sort of continuing protection that a national Constitution is capable of. An actualising interpretation is necessary to give meaning to concepts such as "inhuman and degrading treatment or punishment", "respect for his private and family life" and so on, for which the textual and contextual approaches alone are insufficient.

All in all, the different aspects discussed in this chapter indicate that the ECHR is interpreted in a contrasting environment and many factors influence the interpretation process and the final meaning given to the applicable rules. The *jurisprudence* of the ECHR as applied by the European Court is developing its own unique identity. Although the family traits of the legal traditions are visible, the *jurisprudence* is not identical to any of its many parents because those various influences were made to "grow" differently by the Strasbourg machinery. On the other hand, the analysis of interpretation cannot be used to predict the outcome of a case although it shows where the justification of the

decisions lie. It also helped to set the scene for a further examination of the other factors operating in the process of decision making such as the effect of various legal systems on interpretation which will be explored in the next chapters.

Decision-making and interpretation in Strasbourg

Comparative law analysis of
the case law of the
European Court of
Human Rights.

(1st. part)

*The scales remain the symbol of justice, here too; but here too the balance is hard to find and only rarely does one succeed in arriving at the point of perfect balance with such persuasive force that nobody can dissociate himself from it!*⁵⁸⁶

Introduction

The day to day work at the European Court brings it into contact with the different legal systems of the member states of the Council of Europe. A comparative analysis of the human rights *jurisprudence* offers, therefore, the opportunity to discover whether, and if so when, the different legal systems and traditions shape the judicial process and the outcome of the cases. The legal traditions, however, operate in conjunction with other factors in the decision making processes and although they influence the outcomes they do not determine them in their entirety. There are many sources of variation at work such as policy considerations, the margin of appreciation

⁵⁸⁶Judge G. J. Wiarda's final words in a speech delivered on November 20, 1986, quoted by Egbert Myjer, "Dutch interpretation of the European Convention: a double system?", in: F. Matscher and H. Petzold (eds.), Protecting Human Rights: The European Dimension: Studies in honour of Gérard J. Wiarda, (1988), 430.

afforded to the member states, the area of the law touched upon by a particular case and so on.

The analysis in all four chapters concentrates on the European Court's *jurisprudence*, although the Commission's will also be used if helpful to cast light on some point. The Court, the only organ empowered to interpret and apply the ECHR,⁵⁸⁷ is not bound by the opinion of the Commission or its fact-finding: "The Court is not, however, bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it".⁵⁸⁸ In this first chapter of a set of four, the use of the comparative method as a tool of interpretation and research is addressed. A brief reference to questions of policy and to the weaker harmonising powers of the Council of Europe as compared to the EU will be made. In addition, the diversity of legal systems of the member states is mirrored by a similar multiplicity within the Court,⁵⁸⁹ since its members have been appointed from those various legal systems: in Chapter 10 the influence of the Court's composition on decision making will be assessed.

Comparative law in Strasbourg

The cases bring from their legal systems of origin many characteristics, idiosyncrasies and even complications, intertwined with the facts and domestic law, which have all to be dealt with in Strasbourg. The Court's judgments in fact serve not only to decide cases but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, and therefore contribute to the observance by the States of the obligations undertaken

⁵⁸⁷Article 45 ECHR.

⁵⁸⁸*Cruz Varas and others v. Sweden*, (1992) 14 EHRR 1, para 74.

⁵⁸⁹A similar statement can be made of the Commission.

as Contracting Parties.⁵⁹⁰ In doing so, the Court draws inspiration from the member states and at the same time its *jurisprudence* has an impact on their national laws. The existence of differences between systems and traditions is a reality in Europe and a strong argument can be made for their preservation as part of national legal identities. For example, one specific instance in the Report of the Commission in the case *Ireland v United Kingdom* casts light on the extent of these differences. In the case they appeared as a confrontation between the "common law" and "civil law" influences on the approaches of the lawyers' handling of the procedure in general. While the Commission was carrying out the fact-finding investigation, the Irish government insisted on the need to cross-examine witnesses, which is a practice very much ingrained in the adversarial nature of the criminal procedure of any common law jurisdiction, and

objected to the procedures which were adopted for obtaining this evidence and have submitted that it should not be received. They have, referring to the terms of Article 28 of the Convention, submitted that an investigation carried out by the Commission under that Article should be undertaken with the representatives of the parties, and accordingly the Commission should, when it decided to hear witnesses, do so in the presence of the representatives of the parties, who should be accorded the right to question witnesses.⁵⁹¹

The Commission thought otherwise, however. The point of interest is that the differences between the traditions may cause confusion if not addressed skilfully. The lack of common ground in this case highlights the different assumptions underlying a legal system, a situation which was well put, in another context, by Lord President Hope quoting Judge Edward:

⁵⁹⁰Article 19 ECHR.

⁵⁹¹*Ireland v. U.K.*, Report of the Commission, App. 5310/71, Series B, vol. 23-I, 178-179.

(...) the legal methods which we adopt reflect the assumptions we make when choosing them. These assumptions are often unspoken and rarely recognised. As [Judge Edward] put it, "legal systems differ, not just because they belong to the common law family or the civil law family, but because each of them is the product of the history, culture and traditions of the people it sets out to serve".⁵⁹²

It has to be said that many of the distinctions frequently drawn between the civil law and the common law simply do not apply any more. Sweeping generalisations can be misleading and useless. In a surprising number of cases the legal systems at both sides of the divide arrive at the same solution, albeit through different paths.

Nevertheless, various fundamental differences in legal method and reasoning continue to survive and it is equally misleading to ignore them when interpreting a text such as the ECHR which is bound to apply to a variety of legal systems. Despite the concurrence of the legal systems in many areas, if the same (hypothetical) legal question was asked in, for example, Edinburgh, London, Paris or Rome, the answers might well not be the same.

Another point concerns the terms used in this section. To begin with, a legal system or legal order is understood as an operating set of legal institutions, procedures and rules.⁵⁹³ This definition can be applied to the English, Scottish, French, Italian and other legal systems in the world. Each legal order has a connecting thread⁵⁹⁴ running through it to the extent that it was possible to classify a group of systems into families even though their legal institutions, procedures and rules were not exactly the same. Similarly, Professor Watson has said that the affinities between any two civil law systems are greater

⁵⁹²The Right Honourable Lord Hope, "From Maastricht to the Saltmarket", S.S.C. Biennial Lecture, 1992, 5.

⁵⁹³J. H. Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America, (1969), 1.

⁵⁹⁴E. Özüçü, id., 310.

than those between any civil law system and any common law system.⁵⁹⁵ The theory of "legal families",⁵⁹⁶ which seeks to divide the vast number of legal systems of the world into a few large groups, is therefore grounded on such observations. In this sense, for example, the systems of England, New Zealand, California and New York as derivatives from English law can be called "common law" systems, while the systems of France, Germany, Italy or Switzerland, which have an important connection with Roman law should be called "civil law" systems.⁵⁹⁷ There are also the mixtures of the two, like Scots law or the Roman-Dutch law of South Africa.

The metaphor of distinct legal families must be used cautiously, though, because of the important points of convergence and the fact that the groupings are very contingent. Classifications are vulnerable to historic changes, for example, the contemporary Japanese⁵⁹⁸ legal system can be taken out of the oriental family and put with those systems of European origin. Not long ago, the Eastern European countries would have not qualified for membership of the Council of Europe because of the socialist influence on their legal orders. Further, some classifications seem to take into consideration only one aspect of a legal system: Japanese and Latin American private law belongs in the Continental family, but due to the American influence, their constitutional law may be grouped with that of the United States.

⁵⁹⁵A. Watson The Making of the Civil Law, (1981), 1.

⁵⁹⁶K. Zweigert and H. Kötz Introduction to Comparative Law, (1987), 64.

⁵⁹⁷J. H. Merryman, id., 1. This author explains that what binds the civilian nations together is that their "indigenous" legal institutions have been combined with the form and substance of Roman civil law, and the autochthonous legal contribution does not go to basic legal attitudes, notions, organisation and style of the legal system because those are drawn from Roman law. (at p. 13/4)

⁵⁹⁸K. Zweigert and H. Kötz, id., 66.

To make groupings, some authors place the legal systems of the world in "cultural perspective"⁵⁹⁹ in order to put together systems on the basis of traditions rooted in the beliefs and emotions of a people⁶⁰⁰ or even the particular mythology⁶⁰¹ of the law so familiar to their respective lawyers (and judges). A "legal tradition" has been defined as a set of deeply rooted, historically conditioned attitudes about the nature and the role of law in society, the organisation and operation of the legal system, the way law is made, applied, studied and taught.⁶⁰² As Roy Goode wrote:

there remain striking differences between legal writing in continental Europe and legal writing in England; between the things that interest us and the things that interest our civil law colleagues; between a case-based system, where the facts are considered of decisive importance and figure prominently in the judgment, and a code-based system, where the key feature is the statement and application of principle, whilst the facts are relegated to the background and stated only very briefly; and between the civilian approach and the common law approach to the formulation and interpretation of enacted law.⁶⁰³

Dissimilarities still persist so it is possible to speak of a comparative method. Within each tradition differences tend to be of degree between the countries belonging to it, as "a legal tradition is, first and foremost, about a *mentalité* rooted in history."⁶⁰⁴ That said, we can address the role of the comparative method both in the process of decision making in Strasbourg and for us in this dissertation.

⁵⁹⁹J. H. Merryman, *id.*, 2.

⁶⁰⁰Harold J. Berman Law and Revolution: the Formation of the Western Legal Tradition, (1983), 558.

⁶⁰¹Peter G. Stein, "Judge and Jurist in the Civil Law: a Historical Interpretation", (1985) 46 *La. L. Rev.* 241, and James C. Hair, "A Comparison of the Roles of American and Civil Law Judges in the Development of the Law." (1969) 2 *Vanderbilt Int'l* 39.

⁶⁰²E. Özüçü *op. cit.* 311.

⁶⁰³Roy Goode, "The European Law School", (1993) 13 *Legal Studies* 1, 3.

⁶⁰⁴Pierre Legrand Jr., "The Common Law *mentalité*: An Italian Primer", (1993) 13 *Legal Studies* 271.

Comparative law as a tool of interpretation: the survey of the status of the European law in a certain area.

Comparative law is daily business in Strasbourg as it is inextricably connected with the interpretation of the Convention. From the outset, the comparative method becomes a part of the balancing activity of the Court. When seized of a case, it tries to make sense of the litigation within the context of the legal system from where it comes. Although the member states are said to be, in the Convention's own words, "countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law"⁶⁰⁵, their legal orders differ, for example, in their legal vocabulary, their categories for organising and systematising rules, their techniques of interpretation and their structures, sources, hierarchies, courts, organisation of the legal profession and so on.⁶⁰⁶

Before the Court, these features typical to a legal order or shared by a legal family can be seen in actual cases, as will be discussed. To begin with, this pluralism can be seen in operation in the close connection between the comparative method and the adjudication process whenever an alleged breach is gauged against a set of common principles, a sort of "common law", coming from the general body of the laws of the member states taken as a whole, and incidentally, by which the ECHR itself was inspired.⁶⁰⁷ Such law derives from what is said to be a

⁶⁰⁵Preamble to the ECHR.

⁶⁰⁶E. Özüçü, "An exercise on the internal logic of legal systems" (1987) 7 Legal Studies 310, 310.

⁶⁰⁷W. J. Ganshof van der Meersch, "Reliance in the Case-law of the European Court of Human Rights, on the Domestic Law of the States", (1980) 1 HRLJ 13, 15.

"European consensus"⁶⁰⁸ or a "European public policy"⁶⁰⁹ on a certain matter. It is not necessarily the lowest common denominator. The Court usually uses generalisations such as "the law of the member States of the Council of Europe", "the law of the Contracting States" or some other similar wording in order to suggest that this shared law is mainly "discovered" by comparative research. By way of analogy, as it has been said of the ECJ, in Strasbourg "to evolve common principles from the various constitutional systems of the member States a comparative method is needed."⁶¹⁰

The Court borrows from the national legal systems, for example, principles such as proportionality or due process of law.⁶¹¹ In the words of a senior official in the Court's Registry: "...there's an attempt to draw common principles "fished" ... from the traditions of all the member states and the general principles which seem to be common to all of the member states rather than a deliberate attempt to amalgamate common and civil law traditions ..."⁶¹² The amalgam, nonetheless, is the outcome of this process. The comparative method is, in addition, useful to guide the production of a solution that can be transplanted to other legal systems. Scheuner observed a similar concern in the system of the EU:

The comparative analysis cannot cling to particular details, but must follow the general trend of the evolution of legal prescriptions; it must lead to a result acceptable in all member States. Its object must be to find the rules best suited to express a

⁶⁰⁸Laurence R. Helfer, "Lesbian and Gay Rights as Human Rights: Strategies for a United Europe" (1992) 32 Va. J. Int'l L. 157.

⁶⁰⁹Pablo Antonio Fernández-Sánchez, Las obligaciones de los estados en el marco del Convenio europeo de derechos humanos, (1987), 44.

⁶¹⁰U. Scheuner, "Fundamental Rights in European Community Law and in National Constitutional Law", (1975) 12 CML Rev. 171, 185.

⁶¹¹Marc-André Eissen, "L'interaction des jurisprudences constitutionnelles nationales et de la jurisprudence de la Cour européenne des Droits de l'Homme" in Dominique Rousseau and Frédéric Sudre, Conseil Constitutionnel et Cour européenne des Droits de l'Homme (1990), 211.

⁶¹²Meeting with a senior official at the Court's Registry, on September 14, 1992.

common tradition and compatible with the structure of the Community.⁶¹³

A difficult equilibrium is sought in Strasbourg between the respect owed to the interests of the community represented by the respondent governments versus the rights of the individual plaintiff that turns to the Convention for redress (it is not impossible that within the interests of the community the government may be representing the interests of other individuals). For example, this is the "fair balance" performed in *James v. United Kingdom*:⁶¹⁴

Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the aims employed and the aim sought to be realised. This latter requirement was expressed in other terms in the *Sporrong and Lönnroth* judgment by the notion of the 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

Yet the respondent government should not be seen as representing the interests of the community all the time. Occasionally it merely represents its own interests, as for example, in the numerous Italian delay cases where the European Court found a breach of Article 6 (1) ECHR. The respondent government tried to justify the delays and to protect the right of its national judiciary to take time to decide, attributing the procrastination in a series of cases⁶¹⁵ to the workload of the relevant courts and their backlog of cases, although, since *Vocaturo v. Italy*,⁶¹⁶ the

⁶¹³U. Scheuner, *ibid.*

⁶¹⁴(1986) 8 EHRR 123, para. 50.

⁶¹⁵Selection of ten Italian cases decided in 1991: *Cappello* (22/1991/274/345), *Caffè Roversi S.p.a* (25/1991/277/348), *Gana* (36/1991/288/359), *Barbagallo* (38/1991/290/351), *Cooperativa Parco Cuma* (50/1991/302/373), *Tusa* (44/1991/296/367), *Lorenzi, Bernardini & Gritti* (59/1991/311/382), *Manifattura FL* (15/1991/267/338), *Steffano* (16/1991/268/339) and *Ruotolo* (18/1991/270/341).

⁶¹⁶(28/1990/219/281).

European Court had found those reasons not admissible as an excuse. Incidentally, and not to mention that these cases highlight certain inefficiencies of a legal system, many of them were rather simple, so one may wonder whether they should have ever been heard at all by the European Court as they may represent a misuse of (scarce) judicial resources in Strasbourg.⁶¹⁷

Generally speaking, adjudication in Strasbourg can be defined as an independent international judicial review of the laws, policies and practices of the member states where the ECHR becomes the yardstick to measure the behaviour of the governments and limit their abilities to restrict rights. The European judges construe the ECHR as a "living instrument", as any constitutional judge would do with a basic law thought to survive the passage of time. The active judicial role is acknowledged sometimes. In *Tyrer v. the United Kingdom* the Court ruled that the ECHR should be construed as a "living instrument", and in *Marckx v. Belgium*⁶¹⁸ it understood the Convention "in light of present-day conditions". The latter would appear to support the view that changing times are more important than the *travaux préparatoires* or the intentions of the framers. It can be a matter of opinion whether this sort of interpretation⁶¹⁹ is tantamount to treaty revision.

Both the ECHR's language and structure give the judges room to bring it up to date by way of interpretation. The comparative method surely has to be counted as another

⁶¹⁷John Andrews, "Trial Delays in Italy" (1991) 16 EL Rev. 359, 360. Also relevant for this stage are: John Andrews, "Trial Delays in Italy" (1983) EL Rev. 146, "Natural Justice in Italy" (1984) EL Rev. 290 and "Trial in absentia in Italy" (1985) EL Rev. 368, as well as: John Andrews and A. Sherlock "Trial within a reasonable time" (1988) EL Rev. 68 and V. Andrioli, "La Convenzione europea dei Diritti dell'Uomo e il processo giusto" (1964) 7-8 Temi Romana, Rassegna di Giurisprudenza 442.

⁶¹⁸(1979-80) 2 EHRR 330.

⁶¹⁹The "dynamic" interpretation of the ECHR also opens up a new opportunity for counsel to the applicant when the complaint against the government is filed with the European organs. The restrictions within the legal system under which the plaintiff could not obtain protection for his rights may be removed to a certain extent, and new, "European" standards apply to the case.

ingredient of particular importance in its interpretation and development. As we have seen so far, one use of the comparative method was to build benchmarks for the Court to judge the allegedly offensive behaviour of the defendant government against a general body of the law of all other members, or at least some of them. The use of the comparative method helps the Court to set a common level of protection⁶²⁰ which the member states are bound to implement, although it should be added that this common denominator is not identical to sum of the laws of the member states.⁶²¹

Let us look at a few examples. In *Abdulaziz, Cabales and Balkandali v. the United Kingdom*⁶²² the Court resorted to the opinion of experts to find out what was the European consensus on sex discrimination and equal protection under the law. In *Winterwerp v. the Netherlands No. 1*⁶²³ the Court resorted to a similar procedure to find out the Europe-wide opinion as regards the notion of mental illness. The Court observed that the phrase "persons of unsound mind" had a meaning that "is continually evolving as research in psychiatry progresses". The idea behind the practice in those two cases was that the general trend of protection of human rights evolves regardless of whether a particular contracting state has altered its own domestic law or case law. The system cannot be static, because its progress is fed by the evolution of standards in changing times. This is clear in *Soering v. the United Kingdom*, where the Court, after repeating that "the Convention is a living instrument which ... must be interpreted in the light of the present-day conditions" resorted to the "virtual consensus in Western European legal systems" that capital punishment for some peacetime

⁶²⁰W. J. Ganshof van der Meersch, op. cit., 16.

⁶²¹W. J. Ganshof van der Meersch, op. cit., 15.

⁶²²(1984) 7 EHRR 471.

⁶²³(1979-80) 2 EHRR 387.

offences "is, under current circumstances, no longer consistent with regional standards of justice ..."⁶²⁴

The criteria shift according to the changes that take place in Europe so that with the passage of time some standards may become tougher on the member states and more protective of the individual. It is a truism that the laws of the member states are in perpetual adjustment because the legal systems that produce them are all functional. The evolving standards become a part of the Convention system, and consequently the Court acquires tools to guide future judgments and build standards that are more demanding on the member states.⁶²⁵ Incidentally, it would appear that the Court believes in the transplantability of certain principles "discovered" this way for it uses them to test the conduct of fellow member states. The issue of the legitimacy of the European Court in relation to elected legislatures may re-appear in light of these "transplants". Over and above all these considerations, variety of legal systems is a precondition for the viability of a comparative survey.

In *F. v. Switzerland*⁶²⁶ - where a temporary prohibition to re-marry was imposed on a Mr. F after his third divorce - the current status of the "European common law" was introduced by means of a Swiss report on a partial reform of family law which had been presented to the Swiss Department of Justice and Police in 1965. The report advocated the setting aside of the waiting period in question, a proposal which had also been made by a Swiss Committee of Experts on Family Law Reform. The comparative survey allowed the European Court to follow suit on a stronger footing.

⁶²⁴(1989) 11 EHRR 439, para 102.

⁶²⁵Thomas A. O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", (1982) 4 (4) Human Rights Quarterly 474, 481.

⁶²⁶(1988) 10 EHRR 411.

The survey can also be introduced by way of "finding" it in the international treaties already signed by the member states. The Court did so in *Inze v. Austria* (a case concerning the hereditary rights of illegitimate children), in those terms:

The question of equality between children born in and children born out of wedlock as regards their civil rights is today given importance in the member States of the Council of Europe. This is shown by the 1975 European Convention on the Legal Status of Children born out of Wedlock ...⁶²⁷

By testing the respondent government's conduct against the "consensus" the Court gained perspective and authority. Where the Court's findings are based on standards drawn from the common practice of fellow member states, they bring with them the influence of the traditions of the entire European legal environment. They form a European public policy.

At the same time, this practice acts as a safeguard for the Court. To avoid an erosion of its credibility and effectiveness, the Court relies on the sense of justice and shared moral precepts of contemporary European society. In no case does the Court apply directly the law of a single member state. It applies the result of the survey produced in Strasbourg, handling it as an issue of fact and not limited by it.⁶²⁸ The extent and grounds on which those surveys are based can, however, be disputed in individual cases:

But how can one find out whether the situation in the member States is uniform or similar, or whether considerable differences exist? It must be admitted that in practice it is only in rare cases that a

⁶²⁷(1988) 10 EHRR 394, para. 41.

⁶²⁸W. J. Ganshof van der Meersch, *op. cit.*, 19.

thorough comparative investigation is possible and is actually undertaken.⁶²⁹

Judge Matscher, for example, in his dissenting opinion in the *Oztürk v. Germany*⁶³⁰ case was dissatisfied with the narrow scope of the comparative survey: "In my view, autonomous interpretation would call for comparative studies of a far more detailed nature than those carried out so far by the Convention institutions." The issue required of comparative research was the concept of "criminal offence" in Germany. The Austrian judge thought that there was no "common denominator" in this matter and proceeded to support his statement with his own, albeit limited, comparative research, as follows:

in the law of the Federal Republic of Germany -the State concerned- 'regulatory' offences (*Ordnungswidrigkeiten*) clearly lie outside the realm of criminal law; the same is true of Austrian law (*Verwaltungsstraftaten*) and French law, Netherlands law (and possibly the legal systems of other European countries) are preparing to move in the same direction.

There are, however, other components of the decision making process operating in the opposite direction. One of those factors is the work of the Court to make sure that there is sufficient evidence for a change in the relevant area before embarking on a new interpretation. The probing procedure looks for the values which were protected by a given provision in order to check whether there was any change in current (and European) democratic society. The comparative law survey is therefore closely connected to the doctrine of the margin of appreciation as a limitation on the Court's creativity. The consensus-forming elements range from a European legal opinion on a certain area, to the international treaties or regional

⁶²⁹Rudolph Bernhardt, "Thoughts on the interpretation of human rights treaties" in Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda, F. Matscher and H. Petzold (eds.), (1988), 67.

⁶³⁰(1984) 6 EHRR 409, judge Matscher's dissent.

legislation in force in the member states, to the opinion of experts or even European public opinion.⁶³¹ The effect of all those elements is balanced out, however, by the fact that the contracting states are entitled to a degree of deference, or "margin of appreciation for their actions" as the Court has acknowledged in, for instance, *James v. the United Kingdom* or *Abdulaziz, Cabales and Balkandali v. the United Kingdom* to give just two examples.

The doctrine of the margin of appreciation concerns the latitude allowed to the contracting states in their observance of the ECHR:⁶³² it examines the degree to which the European Court (and the Commission) will inspect the member state practice complained of and check whether the government acted beyond its powers. If wide, it involves judicial restraint and is pro-government; if narrow, a more thorough examination will be made and is pro-applicant. One view of the doctrine is that it is "objectionable as a viable legal concept"⁶³³ because it is "not capable of precise formulation"⁶³⁴, however, for other authors, it is "one of the most important safeguards developed by the Commission and Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy".⁶³⁵ Sometimes the doctrine may appear as an abdication by the Court of its responsibility to put the ECHR into effect.

The breadth of the margin usually depends on factors such as the nature of the right and its restrictions, the type of issue of the case, its context and the obligations

⁶³¹Laurence R. Helfer, op. cit., 165.

⁶³²Thomas A. O'Donnell, op. cit., 475.

⁶³³R. Higgins, "Derogations Under Human Rights Treaties", (1976-77) 48 BYIL 281, 315.

⁶³⁴C. Morrisson, "Margin of Appreciation in European Human Rights Law", (1973) 6 *Revue des droits de l'homme* 263, 284.

⁶³⁵H. Waldock, "The Effectiveness of the system set up by the European Convention on Human Rights", (1980) 1 HRLJ 1, 9.

assumed by the member state concerned (i.e. whether there are derogations). As said, it is tied up to a comparative survey. If it is revealed that there are (wide) disparities in the legal practices of the other member states or even other democratic states and as a result, the "European consensus" is low, then most often the member states are afforded a wider margin of national discretion. In the *Handyside* case the Court asserted that "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge" to decide the proper application of the Convention to specific contexts, and in the words of the Court "it is for the national authorities to make the initial assessment"⁶³⁶ of whether a particular action or law is in line with the ECHR. The Court was aware that "(...) it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective law of the requirements of morals varies from time to time and from place to place (...)"

The doctrine may be a substitute for a proper gatekeeping device such as the *certiorari* procedure of the American Supreme Court, and in this sense it may have been used to avoid hearing certain thorny issues, for example, what is obscenity.⁶³⁷ In *James v. the United Kingdom* the Court repeated a similar argument where the variability of the local conditions were taken into consideration, and said that "because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'"⁶³⁸

⁶³⁶(1979-80) 1 EHRR 737, para. 48.

⁶³⁷Thomas A. O'Donnell, op. cit., 482.

⁶³⁸(1986) 8 EHRR 123, para. 50.

If the degree of consensus among the legal systems of the member states is "high" (or "higher" if compared with situations such as those discussed above), then the room for national discretion will be confined. In the *Sunday Times Case No. 1* the Court said that "... the domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area (...) Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation".⁶³⁹ At times then, the Court will require a stricter compliance with its Europe-wide archetype of a single system of protection. For example, Professor Bradley⁶⁴⁰ made the point that in *Tyrer v. UK* the Court rejected the concept of devolution and endorsed one human rights policy for all the member states, setting aside arguments to the contrary. One of the main issues in this case was whether flogging young offenders, which seemingly had a long tradition in the Isle of Man, constituted a degrading punishment in violation of Article 3 ECHR. The Court, apart from not letting the United Kingdom government act independently in this matter reminded us "... that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions."⁶⁴¹ *Soering v. the United Kingdom*⁶⁴² is another example of this. The rationale behind these cases can be loosely compared to that of delegated power from the central government to a minister where a breach occurs if the range of the delegated responsibility is overstepped. It goes without saying that, unlike ministers, member states have the powers to begin with (they are sovereign entities), but the idea is the exercise of discretion within boundaries, and when a member state crosses a threshold, then a

⁶³⁹(1979-80) 2 EHRR 245, para. 59.

⁶⁴⁰A. W. Bradley, "The United Kingdom before the Strasbourg Court: 1975-1990", in: W. Finnie, C.M.G Himsworth and N. Walker (eds.), *Edinburgh Essays in Public Law*, (1991), 204.

⁶⁴¹(1979-80) 2 EHRR 1, para. 31.

⁶⁴²(1989) 11 EHRR 439, para 102.

violation takes place. In *Inze v. Austria* the European Court put forth the theory in those words:

The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to the circumstances, the subject matter and its background.⁶⁴³

The *Lawless* case⁶⁴⁴ was the first where the Court had made use of the doctrine. The Commission had also addressed the margin of discretion to be afforded to the government in a situation of emergency. The leeway given to the authorities in this case, according to some commentators, had been too wide.⁶⁴⁵ A less than ideal or bad way of implementing the ECHR does not automatically amount to a violation even though the Court may feel that there was a better way of doing things. This leads us to believe that the Court is reluctant to use the doctrine to iron out diversity and pragmatically enough, national legal systems are left free to implement the protection in their own national terms and traditions. For this reason, this practice placed another constraint on the Court in the form of a requirement that judgments would only enunciate interpretations to the extent strictly necessary to decide a particular case and would not go any further.

In addition, the doctrine of the margin of appreciation confirms in an indirect way that the European system comes second to the member states as regards the protection of rights. National authorities, and not the Strasbourg mechanism, are primarily entrusted with the responsibility for securing the rights and freedoms within the domestic legal order.⁶⁴⁶ European actions should not replace those

⁶⁴³(1988) 10 EHRR 394, para. 41.

⁶⁴⁴ (1960-61) 1 EurCtHR (ser B), 408.

⁶⁴⁵Jaime Oraá, *Human Rights in States of Emergency in International Law*, (1992), 9.

⁶⁴⁶Article 26 ECHR.

of national authorities except where necessary. In this sense, Strasbourg can be termed as "subsidiary" vis-a-vis the protection afforded in municipal law. If the law or the case law of a member state are within the "margin" of compatibility with the ECHR, the Court steps back: "... the 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ..."⁶⁴⁷ The point that needs to be made is that this attitude can be connected to the concern of the European Court to protect the existing differences and diversity of the legal systems of the member states reflecting their various legal cultures. For example, in the *Belgian Linguistic (No.2)* case the Court found that "[it] cannot disregard those legal and factual features which characterise the life of the society in the States which (...) has to answer for the measure in dispute".⁶⁴⁸

The Court steers the interpretation of the Convention through the tension between opposites. Interpretation does not go entirely unchecked in any one direction. The comparative method as an interpretative device helps the Court define a standard to measure allegedly offensive conducts. The awareness of the Court that the system of the Convention as a whole rests upon the consent of the contracting states runs through the *jurisprudence*:⁶⁴⁹ the international law maxim that in case of doubt a treaty is to be interpreted in favour of the freedom of the state concerned is not unknown for the judges. The Court's jurisdiction and enforcement powers are limited by the extent to which the European governments abide by its decisions. In an extreme case, a member state faced with an unfavourable judgment could pull out of the Convention

⁶⁴⁷(1986) 8 EHRR 123, para. 50.

⁶⁴⁸(1979-80) 1 EHRR 252, para. 10.

⁶⁴⁹François Ost, "Dynamique de la relation Europe-Etats; Originalité des méthodes d'interprétation de la CEDH" in Delmas-Marty (ed.) Raisonner la raison d'Etat; Vers une Europe des droits de l'homme (1989), 458.

system altogether, although it would still be bound by the decision of the Court in the instant case under Article 65 ECHR. The enforcement organs could be seriously impaired if some displeased state withdraws from the system.⁶⁵⁰ Even if a complete withdrawal is not attempted, a member state can express its displeasure by failing to comply with a decision or by delaying its enforcement. The balance the Court is asked to perform is very delicate, because it must not be so threatening to the states that they may decide to leave the system, but at the same time, it must review state compliance with the Convention and censure if appropriate,⁶⁵¹ which are the reasons for existence of the entire Strasbourg system.

Some policy considerations

Interpretation cannot always be explained as a purely legal balance and policy reasons may explain a particular resolution of a case. It has been said that "the vague language of the Convention has to be applied in concrete circumstances, and the Court must grant some latitude to the member states in face of their diversity".⁶⁵² The absence of a set of clear principles governing the doctrine of the margin of appreciation makes the Strasbourg machinery run another risk, that of being perceived as unfair. Howard C. Yourow was very critical of the situation:

Without the benefit of a self-developed, principled margin analysis, the Strasbourg machinery may in the longer run be misperceived as unfair to those challenging human rights violations before a Court which is hypersensitive about its own image and the need and images of the national authorities upon whom

⁶⁵⁰Thomas A. O'Donnell, *op. cit.*, 477.

⁶⁵¹Mark Janis and Richard S. Kay, European Human Rights Law, (1990), 96.

⁶⁵²Thomas A. O'Donnell, *op. cit.*, 478.

its very survival as a potentially effective power depends.⁶⁵³

C. C. Morrison⁶⁵⁴ saw an element of judicial self-restraint in the doctrine of the margin of appreciation. Van Hoof's criticism of Judge Martens' dissenting opinion in *Brogan* is based precisely on what he considered to be an excessively self-restrained attitude on the part of the judge. According to that author the Dutch judge reduced the theory of the reason of state to a reasonableness test. Judge Martens had said that "the Court can find that the United Kingdom (...) overstepped the margin of appreciation it is entitled to (...) only if it considers that the arguments for maintaining the seven-day period are wholly unconvincing and cannot be reasonably defended." He added that "the Court should respect the United Kingdom Government's choice and cannot but hold that they did not overstep their margin of appreciation."

On the other hand, it would appear that at the European Court there is scope for judicial activism, which can be understood not only:

(...) as an attitude or as a legal climate, but also as part of the particular setting in which it makes its influence felt. It may have some of its roots in the minds of the judges, but as a historical phenomenon, it is also firmly rooted in society, looking as it does for the balance between the powers of institutions and the challenges of social evolution. And one only hopes that judges know how to strike the balance.⁶⁵⁵

The tension between judicial activism and strict constructionism is apparently necessary for a healthy

⁶⁵³Howard Charles Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence", (1987) 3 Connecticut Journal of Int'l Law 111, 153.

⁶⁵⁴C. C. Morrison, The Developing European Law of Human Rights (1967)

⁶⁵⁵Thijman Koopmans "The roots of judicial activism", in: F. Matscher and H. Petzold (eds.), Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda, (1988), 327.

stability at the Court.⁶⁵⁶ The Court strikes a balance between being too conservative -and thus running the risk of being accused of failing to uphold the ECHR- or too liberal -and running the risk of being accused of making improper incursions into judicial legislation.⁶⁵⁷ The Court is torn in its policy choices between choosing a rather "liberal" or pro individual plaintiff interpretation of the Convention and the need to respect the margin of appreciation of the member states. For the individual plaintiff the ideal interpretation of a human rights treaty is one that is broad when finding the meaning and scope of the liberty at issue but restrictive when it comes to setting its limits.

The comparative method is, of course, double edged. It is obviously helpful to understand the legal system of the defendant state and, therefore to pay due respect to the governments and any national sentiments involved.⁶⁵⁸ Nonetheless, the transplantation of alien principles taken from other legal traditions without the intervention of local legislatures and by means of the comparative method may raise the issue of the legitimacy of the European Court. This situation is connected to two other elements. One is that judges in Strasbourg seem aware of the fact that the judicial review they perform may run counter to local legislation which has been passed by the democratically elected legislatures of the member states. The other one is the ground rule that sovereign states and their organs shall strike the first balance of rights, according to the local legal system and prevalent traditions. It may be argued, however, that the concern over a more lenient attitude towards the member states has become less important today after several years of the

⁶⁵⁶Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin", (1990) 11 HRLJ 57, 88.

⁶⁵⁷J. G. Merrills, The development of international law by the European Court of Human Rights, (1988)157.

⁶⁵⁸The national judge of the defendant state always sits in the Court.

operation of the Convention. Moreover, its mechanism appears now well established and able to distance itself from the contracting states when necessary. Whatever the case, the reason of state is still a component interwoven with the interpretation of the Convention and as such it has to be acknowledged as a piece in the adjudication process.

To clarify and systematise the study of the defence of the reason of state, Mireille Delmas-Marty⁶⁵⁹ linked this issue to the rights, derogations, exceptions and restrictions laid down in the ECHR and its Protocols. In her view, a first group of rights appears to be almost "immune" to the reason of state since they are not subject to any explicit balancing. There is no interest of the society to justify any interference.⁶⁶⁰ Those rights concern, for example, the prohibition of slavery, or of torture or inhuman or degrading treatment or punishment.⁶⁶¹

Two other groups of rights are vulnerable, however, to certain degrees of curtailment because of the reason of state. Some liberties are protected unless a notice of derogation⁶⁶² under Article 15 ECHR is entered. Derogation could take place "in time of war or other public emergency threatening the life of the nation" and is permitted "to the extent strictly required by the exigencies of the situation". The member state is required to keep the Secretary General of the Council of Europe informed of the "measures which it has taken and the reason therefor." In *Lawless and Ireland v. the United Kingdom* the reason of state was not, however, so supreme a notion that it could

⁶⁵⁹Mireille Delmas-Marty, Raisonner la raison d'état: vers une Europe des droits de l'homme, (1989), 497-8.

⁶⁶⁰Margaret G. Wachenfeld, "The Human Rights of the Mentally Ill in Europe under the European Convention on Human Rights", (1991) 60 *Nordic Journal of Int'l Law* 109, 277.

⁶⁶¹They are set down in Articles 3, 4 (1), 7 ECHR and in Article 4 of Protocol 7.

⁶⁶²Mireille Delmas-Marty and Gérard Soulier "Restraining or Legitimizing the Reason of State?", in: Mireille Delmas-Marty (ed.) The European Convention for the Protection of Human Rights: International Protection versus National Restrictions, (1992), 8.

not be examined by the Court as to whether the dangers invoked were those "threatening the life of the nation."

Another group of rights are subject to exceptions that qualify them on a permanent basis: for example, the deprivation of the right to life would not be unlawful in a case of self-defence, or in order to effect a lawful arrest or to prevent the escape of someone lawfully detained. Similarly, the right of personal freedom can be limited in case of lawful detention and so on.⁶⁶³ In the case *Ashingdane v. the United Kingdom* the Court found that the limitations placed to the personal freedom of the applicant were lawful and did not breach Articles 5 and 6 ECHR. Mr. Ashingdane had been committed to a mental hospital after conviction for a number of offences. Due to an improvement in his condition he was to be transferred but the relocation hospital refused admission. The Home Secretary did not order the transfer to proceed. Neither the European Court nor the Commission found a breach of Article 6 (1) ECHR. The balance of rights was performed granting the member state a margin of appreciation to set its own policy on access to courts as it was not for the European Court to suggest the best policy on this matter:

(...) the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication, since the right of access, 'by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals.' In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in the field.⁶⁶⁴

⁶⁶³ Those rights are set out in Articles 2, 4 (2), 5, 6 ECHR and in Articles 1 and 2 of Protocol 6.

⁶⁶⁴ (1987) 7 EHRR 528, para. 57.

The limitations placed on the right were however subject to supranational scrutiny by the Court, who checked whether it was proportional to the aim sought. Otherwise the ECHR system would have been emasculated:

(...) the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 (1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.⁶⁶⁵

The defence of the reason of state arises, finally, in those permanent restrictions which concern interferences accepted in a democratic society.⁶⁶⁶ For example, in *Dudgeon v. the United Kingdom*⁶⁶⁷ with regard to homosexual offences under Article 8 ECHR, the Court recognised the right of the member states to decide on the most appropriate protection of morals in their jurisdictions, fixing the age of consent in relation to homosexual behaviour. On January 21, 1976, the police searched Mr. Dudgeon's address in Northern Ireland under the Misuse of Drugs Act 1971. During the search a quantity of cannabis was found and this led to the incrimination of a person. In the search, some of Mr. Dudgeon's personal papers describing homosexual activities were found and seized, and later used as grounds for questioning him at a police station. The papers were afterwards handed over to the Director of Public Prosecutions with a view to instituting proceedings for the offence of gross indecency between males. The director, in consultation with the Attorney General, decided not to bring proceedings. Although the European Court acknowledged the policy issue of "(...) the

⁶⁶⁵(1987) 7 EHRR 528, para. 57.

⁶⁶⁶Those restrictions are laid out in Articles 8, 9, 10, 11 ECHR and 1 of Protocol 1, 2 of Protocol 4 and 1 of Protocol 7.

⁶⁶⁷(1982) 4 EHRR 149, para. 62.

legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth (...)", it nonetheless found a breach of Article 8 ECHR in regard to the existing legislation in Northern Ireland in relation to homosexual acts between men aged over 21. Mr. Dudgeon was held to be a "victim" even though he had never been tried for such an offence. It was the nature of the system that was in question, since its mere operation amounted to an interference with Mr. Dudgeon's rights and therefore, violated the ECHR.⁶⁶⁸

Another policy aspect to be taken into consideration stems from the unmatched political approaches of the different governments of the member states in rather fundamental aspects of society, such as property rights. Let us take the case *Gillow v. the United Kingdom*.⁶⁶⁹ The Court found that the refusal of licences under the Housing Law 1969/1975 to the applicants and their consequent prohibition to occupy a house in Guernsey all of which led to Mr. Gillow's conviction and fining, were unjustified and disproportionate interferences to the legitimate aim pursued by a domestic law. The European Court handled with skill the government's policy designed to restrict the right of a non-islander to buy property and live on the island and avoided a frontal attack on the domestic legal system although it found that the application of the law to the actual case was in breach of the ECHR. Concerning the policy issues involved in the legislation, the Court said that "(...) whilst recognising the relevance of the facts relied on by the applicants, the Court considers that the Guernsey legislature is better

⁶⁶⁸Françoise Hampson, "The United Kingdom before the European Court of Human Rights", (1989) 9 YEL 121, 134.

⁶⁶⁹(1989) 11 EHRR 335.

placed than the international judge to assess the effects of any relaxation of the housing controls (...)”⁶⁷⁰

Françoise Hampson wrote that “A government may be more willing to arrive at a friendly settlement where the applicant does not seek to challenge the system but merely its application to him”.⁶⁷¹

To close this section, we should keep in mind that respect for the member states’ policy choices appears to be important for the continuity of the system. It implies that the Court tries also to understand considerations of social, political or economic importance which might constitute the underpinning of legislation or decisions of a member state.

Adjudication in the system of the Council of Europe: the work of the Court.

Convention law comes to life through legal interpretation. To convey the meaning of the ECHR the Court performs a balancing of competing forces with an apparent special emphasis on the rights of the individual: “The Convention therefore implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter”.⁶⁷² There is a purpose to develop the law of the ECHR but this objective is counterbalanced by the existence of brakes and checks. The struggle between the two forces takes different forms. It could appear as a tendency towards judicial activism struggling with strict constructionism, or the ideal of further European integration versus the need to pay heed to the national legal systems of the member states. Other

⁶⁷⁰(1989) 11 EHRR 335, para 56.

⁶⁷¹Françoise Hampson, *op. cit.*, 136.

⁶⁷²*Belgian Linguistics case*, (1979-80) 1 EHRR 252, at page 282.

pressures come from the rival interests of the applicants pushing towards a higher protection of their Convention-based rights versus the claim of the respondent government that a certain action was within its margin of discretion to conduct its own affairs. On other occasions, the conflict appears a matter of judicial choice on the construction of the provisions of the ECHR.

The case *Huber v. Switzerland* is an example. The applicant, Ms. Huber, had been detained by the police on the order of a Zürich District Attorney for examination as a witness in a criminal investigation. After questioning her, the District Attorney ordered her arrest on suspicion of perjury, among other charges. This indictment led to her conviction. She challenged her arrest and conviction on grounds that the District Attorney was not "a judge or other officer authorised by law to exercise judicial power" but her arguments were eventually rejected by the European Court.

Although the facts of the case are not particularly of importance, it serves to illustrate the operation of those forces competing against one another in the process of decision making. The Court had to strike a balance between the margin of discretion of the respondent government and the ideal of a "universalised" (or "Europeanised") compliance with the Convention. The delegate of the Commission before the Court, Professor Schermers, argued for a Europe-wide interpretation of the rights set down in the ECHR. In his opinion there was one single European law of human rights, and he said: "I think the diversity of the laws in Europe and also the diversity of legislation in Switzerland are one of the riches of Europe [...] But as far as fundamental human rights are concerned, they must be the same in Europe throughout."⁶⁷³

⁶⁷³Cour/Misc (90) 87, at 30. (Huber case. Verbatim record of the public hearings held on 28 March 1990.)

He had already offered his own account of the existence of much common ground among the member states on what is basic for the protection of human rights:

[The members of the Commission and the Court] are confronted with legal thinking in other member states of the Council of Europe. Broadly speaking, this experience shows how little are the differences in what is considered to be essential for the protection of human rights. In the long term this common legal basis may prove to be the essential foundation for further European integration.⁶⁷⁴

Or, as a judge of the Court expressed in another case, in a dissenting opinion: "It is the function of national authorities so to arrange their affairs as not to clash with the requirements of the Convention. The Convention is not to be remoulded to assume the shape of national procedures."⁶⁷⁵

On the other hand, the respondent government in *Huber* argued for the acceptance of the variety of solutions and the possibility of interpretations of the ECHR which took account of different legal traditions: "The Court endeavours, in all its decisions, to respect the sovereignty of member States, in so far as there are no clear violations of the Convention."⁶⁷⁶

Reservations were voiced on the approach of the Strasbourg Commission concerning the ideal of one single system in another case, particularly on the transferability of the idea of integration (typical) of EU law:

[In the *Scheisser* case] Professor Schermers argued that the strengthening of human rights goes side-by-side with European integration. It might be said that his is a concept of the European Communities. It is a theme on which Professor Schermers had relied

⁶⁷⁴Henry G. Schermers, "Human Rights in Europe", (1986) 6 Legal Studies 170, 180.

⁶⁷⁵*Case of Brannigan and McBride v. the United Kingdom*, (5/1992/350/423-424), dissenting opinion by Judge Walsh, para. 11.

⁶⁷⁶*Cour/Misc* (90) 87, 25.

before. This is likely to elevate the Convention above its purpose. Not only are not all the States of the Council of Europe members of the Communities, but some of the ones that are, like the United Kingdom, certainly do not subscribe to the idea that the Convention is part of the process of integration. Of course 'integration' may be used in a non-technical sense to describe the political and social coming together throughout the whole of Europe but, however desirable, it is too early to discern a legal component to this process, still less one in which the Convention plays a part.⁶⁷⁷

There is of course a striking difference between the Strasbourg Court and the ECJ on their attitudes towards diversity. Except for the "public policy" exception under Article 48 EEC which allows a degree of leeway or "margin of appreciation" for the member states, the ideal of integration in EU law is a great deal stronger than in Strasbourg:

In the jurisprudence of the European Court of Human Rights there is some recognition of the possibility of variation between one country and another as to the standards to be applied, but understandably, the Luxembourg Court has generally sought to promote the uniform application of law throughout the Community.⁶⁷⁸

In Strasbourg the opposition between unity and diversity runs through the decision making process: the case law has to move constantly between one and the other extreme, a maximum and a minimum. Strasbourg's approach towards harmonisation is weaker as Judge Martens observed in his dissenting opinion in *Borgers v. Belgium*⁶⁷⁹:

(...) the Convention does not aim at uniform law but lays down directives and standards, which, as such, imply a certain freedom for the member States. On the other hand, the preamble to the Convention seems to invite the Court to develop common standards. These contradictory features create a certain

⁶⁷⁷Colin Warbrick, "The European Convention on Human Rights", (1990) 10 YEL 535, 592.

⁶⁷⁸M. H. Mendelson, "The European Court of Justice and Human Rights", (1981) 1 YEL 125, 163.

⁶⁷⁹(1993) 15 EHRR 92.

internal tension which requires the Court to act with prudence and to take care not to interfere without a convincing justification.⁶⁸⁰

A single system, however, may bring about a defeat for the reason that heterogeneity can provide some "raw material" for the preparation of possible solutions and legal interpretation.

More generally, any court has to strike balances between rival interests, views and interpretations. The distinct difficulty for the Strasbourg Court is to ensure equal treatment of all member states, as a particular construction has to be applied (ideally) to a variety of legal systems, whose diversity pulls the system in the direction of accepting different interpretations. This partly explains the relevance of the comparative method as a tool of interpretation for the Strasbourg organs.

Is the European law of Human Rights an identifiable body of law from the point of view of its harmonising effect?

The issues discussed so far bring us to the relationship between the legal interpretation performed in Strasbourg and the control over the harmonising effect of the outcomes of the cases as the judgments have consequences for the uniformity of application of Convention rules. The point is, then, how far the Strasbourg Court can exercise control of the uniformity of outcomes and how strong the idea of harmonisation present in the system of the Council of Europe is, particularly, in view of the European human rights order articulated in the ECHR itself. At this point it is thus necessary to compare

⁶⁸⁰(1993) 15 EHRR 92, Judge Martens' dissent, para. 4.2.

briefly the Strasbourg system with another system which stresses harmonisation, the EU.

Although both the ECJ and the European Court of Human Rights sit in a position where they enter in a dynamic relationship with a multiplicity of legal systems, the ECJ is better equipped to achieve harmonisation in its area of influence. The system of the EU is geared towards that result. This vigorous aspiration is made clear in the stress placed on the harmonisation of results by directive. The idea of uniformity is embedded in the ECJ's *jurisprudence*: there is to be one market and therefore economic operators are not to benefit or suffer from different regimes in different places. The "metalegal notion" of one community cannot be conveyed if the system did not apply equally everywhere.⁶⁸¹ The situation in Strasbourg is different. The Court can declare that a right has been violated or grant monetary compensation and/or just satisfaction to the applicant or if appropriate, request the withdrawal of the offending measure by the member state and the enforcement of its judgments is monitored under Article 54 ECHR by the Committee of Ministers.⁶⁸² Beyond these options, however, there are no other measures that the Court could possibly take.

The ECHR has not superseded national law in its field of application. Unlike human rights law, EU law depends on the simultaneous and uniform application of its norms throughout the EU territory and this is assured by the direct applicability of the regulations⁶⁸³ and the doctrine

⁶⁸¹Joseph H. H. Weiler, "Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities", (1986) 61 Wash. L. Rev. 1103, 1122.

⁶⁸²To discharge this obligation the Committee of Ministers has adopted "Rules Concerning the Application of Article 54 of the European Convention on Human Rights".

⁶⁸³Article 189 EEC describes a regulation as of "general application (...) binding in its entirety and directly applicable in all member States"

of direct effect⁶⁸⁴, under which a provision confers upon individuals or entities rights which they may enforce before their national courts. There is another element involved too, the primacy of EU law over national law and its being a separate legal order.⁶⁸⁵ The system of the ECHR appears a good deal weaker in this respect. In addition, the ECHR does not contain any rules governing its applicability in the domestic legal order.

Furthermore, as regards the pattern of the harmonisation capabilities in the EU, in addition to its contentious jurisdiction, the ECJ has interpretative jurisdiction and can use Article 177 EEC⁶⁸⁶ as a very powerful device for this purpose. In contrast, Protocol 2 added a very limited advisory jurisdiction to the European Court of Human Rights in 1970. The Committee of Ministers can request advisory opinions from the Court, but with the exclusion of the interpretation of all questions within the scope of its contentious jurisdiction. Under this rule, the Strasbourg Court may, for example, interpret the provision in Article 35 ECHR, that "the Commission shall meet as the circumstances require" but not a right guaranteed in the ECHR. In EU law, Article 177 EEC gives the ECJ powers to issue preliminary rulings on the interpretation of the EEC Treaty and on the validity and interpretation of EU legislation, when a national court refers a question to it because its interpretation or ruling is necessary for the decision in a case. The ECJ will rule on EU law and the case will be sent back to the national court for disposal of that law (and national law if relevant) to the facts. The EU system is based on co-operation between the national courts and the ECJ in the application and optimum interpretation of EU law. Under the ECHR, conversely, and

⁶⁸⁴ *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] CMLR 105.

⁶⁸⁵ *Costa v. ENEL*, [1964] CMLR 425 and *Simmenthal v. Commission*, [1980] 1 CMLR 172.

⁶⁸⁶ Article 177 EEC was extended from giving preliminary rulings on matters of interpretation of EEC law on reference from national courts to the principle of direct effects to EEC Treaty articles, Directives, Decisions, and also to international agreements to which the EU is a party.

on issues related to personal morals or privacy, for example, there are considerable differences between the member states:

With regard to certain issues, such as divorce, abortion, homosexuality and pornography, considerably divergent views are held by the various States of Western Europe. The Convention does not require harmonization, it only requires that all States grant minimum protection to the individual. Without preliminary rulings it is to be expected that at least some national judiciaries will interpret particular articles of the Convention more favourably for the individual than the bare minimum.⁶⁸⁷

The powerful tools of harmonisation available to the ECJ are controversial, however. Hjalte Rasmussen⁶⁸⁸ saw an excess of judicial activism in the ECJ's judicial review and suggested the use of policy input analysis as a brake. In his view, several elements should be weighed (e.g. through the press, for instance) within an "impact" study necessary as a yardstick to measure the "legitimacy" of the activism of the ECJ. On the other hand, Professor M. Cappelletti argued for the preservation of the relative freedom from the powers and pressures of the environment enjoyed by (constitutional) courts in judicial review.⁶⁸⁹

Despite the wish to transfer standards across borders, the use of the comparative method as a tool of interpretation and the efforts to test the conduct of the member states equally, the harmonising means available to the European Court of Human Rights necessitate weaker results than those achievable by the ECJ. The interpretation of human rights law has limitations as many sources of variance influence the outcomes. Nonetheless, harmonising effects

⁶⁸⁷Henry G. Schermers, "Preliminary Rulings under the European Convention on Human Rights?" in: Adriaan Bos and Hugo Sibbesz (eds.), Realism in Law-Making: Essays on international law in honour of Willem Ripphagen, (1986), 194.

⁶⁸⁸See: Hjalte Rasmussen, On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking, (1986).

⁶⁸⁹Mauro Cappelletti, "Is the European Court of Justice 'Running Wild'?" (1987) EL Rev. 3, 6.

are cumulative and may indirectly result from the continuous application of this method.

Conclusions

The aim of this chapter has been to discuss the balancing activity and the construction of Convention law in Strasbourg in order to set the theoretical framework to introduce comparative law as a tool of interpretation and lay the ground to derive a tool of study from it in the next chapter.

An overview of the various ingredients of Convention law interpretation has also been attempted. The tension between unity and diversity appeared as an opposition between the following aspects: the idea of further European integration versus the diversity of the members states and their different legal systems; the wishes of the applicant versus the aims of the respondent government; a narrow versus a wide margin of appreciation according to the existence or absence of European consensus on a certain matter (and discovered through a comparative law survey) and so on.

The interpretation of Convention law is a complex procedure. A multiplicity of factors interact: policy considerations brought into the adjudication process by the respect for the reason of state by the Court or its invocation as a defence by the respondent governments; the need to afford a (variable) margin of appreciation to the respondent governments and the general necessity not to alienate the member states by taking inflexible lines on protection. The connections between those elements and one use of the comparative method as a survey was established by means of highlighting the links between a higher "consensus" in the "common law" on a certain area

and the stricter scrutiny of the behaviour of the respondent governments.

The pattern of legal interpretation that emerges is one where various ingredients are closely interrelated and interwoven and where none of them operates in isolation from the others. At the same time, comparative law appears to be more than just one of the elements since it is present in all balancing efforts. Its importance will be observed in a fuller perspective in the next three chapters, where the Court will be seen engaged in a dynamic relationship with a multiplicity of legal systems. The Court carries out a balance of the interests in every case it hears, in circumstances unique to this court: the member states are sovereign (they are not members of a federation); the obligations the Court imposes on them when passing judgment are only binding in international law (there is no direct effect in the EU sense of the term); and finally, the legal systems of the member states provide an environment of civilian, common law and mixed legal systems. Despite the apparent similarity with the system of the EU, in law the tools for harmonisation and control of outcomes are weaker in Strasbourg. The aspiration to transfer standards across borders inspired by the pull towards unity is more difficult to achieve in the system of the European Court of Human Rights where the pull of diversity is less controllable at the "European" end.

Decision-making and interpretation in Strasbourg

Comparative law analysis of
the case law of the
European Court of
Human Rights.

(2nd. part)

Is it possible to support the universality of the concept of man and, therefore, of his fundamental rights in view of the legal families which stand out of a background of so varied spiritual tendencies [...]? [...] As far as I know I have yet to see a comparative law study of human rights dealing with this aspect, which is, no doubt, well worth the effort of fundamental research.⁶⁹⁰

The universal character of human rights is intrinsically attached to their definition rather than to their application.⁶⁹¹

Introduction

Against the background discussed in the previous chapter, this chapter deals with the use of comparative law as a tool to handle the differences between the legal systems that percolate through to the adjudication process. While much convergence has taken place between legal

⁶⁹⁰Joseph J. M. van der Ven, "Les Droits de l'Homme: leur universalité en face de la diversité des civilisations", EUI Working Papers, (1984) 22-23.

⁶⁹¹Carlo Zanghi, "La protection des droits de l'homme: universalisme ou régionalisme?", (1974) 7 RDH 641, 652.

families and systems, the thesis that basic differences between them still persist is reasserted and used in this chapter to ground the comparative method. The method will not appear in this chapter or the next two as a more or less discretionary tool used by the Court in building a yardstick by finding a "European shared law", but as a tool to interpret Convention law in the midst of the pressures and tensions produced by the different answers furnished by the legal systems of the various member states. Some comparative law issues spring from the particular legal system in which the case has been argued. The distinctive legal systems and traditions of the member states are capable of interfering with the harmonising work of the Court. The comparative method is a tool of interpretation of Convention law for the Court and here it is used as a tool of study, and as such, it needs to be resorted to with due regard to its limitations: apart from the different legal systems, there are several (other) sources of variance for the outcomes.

The comparative method: from a tool of interpretation to a tool of study

What is the effect of the surviving differences between the systems in actual cases and how can the effect of these differences be made observable? The European Court is a tribunal placed at the top of a multiplicity of legal systems and it resorts to various comparative techniques in the course of decision making. A comparative method adopted as a tool of study in a sense mirrors these activities of the European Court and, operating "in reverse", it makes those differences visible. Each case analysed will reveal the tension between the traditions in microcosm. Despite the various difficulties in identifying the criteria for

distinguishing one legal system from the other and the arbitrariness that might be involved in the selection eventually made⁶⁹², the chosen "differentiating qualities" will provide a framework to make the comparative law tensions come to light. Zweigert and Kötz have classified the elements that determine the similarities between civilian law systems. For the framework of this discussion, their classification will be "amended" and used as a tool to bring to light the differences between the legal traditions, as follows: (1) the general structure of the legal system of the respondent member state, (2) the procedural law, (3) the rules of evidence, (4) the institutions particular to the legal system of a member state, and finally, (5) the classification and rules of what is private and public law.⁶⁹³ This study therefore counts on the possibility of identifying (with a reasonable degree of certitude) the civilian and common law elements present in the case law of the European Court, in order to compare the tendencies towards opposite solutions offered by the traditions and point out the final choice of the Court (which, of course, may have also been influenced by other factors). It should be added that in the analysis of the cases those "differentiating qualities" are probably at different levels of generality or specificity but, applied to individual cases, they will help us to avoid generalisations and all-embracing "differences" and to concentrate on the concepts and techniques⁶⁹⁴ used by the Court. In Basil Markesinis' words:

⁶⁹²See previous chapter.

⁶⁹³See A. Watson The Making of the Civil Law, pp. 1 and 14; also K. Zweigert and H. Kötz Introduction to Comparative Law, 69. The Argentine scholar Julio Cueto-Rúa in "The Future of the Civil Law" (1977) 37 La. L. Rev. 645 at p. 645 discusses the different meanings attached to the expression "civil law": i- a system of law, i.e. the civil law, as opposed to the expression "common law"; ii- the private law of the civilian legal systems, as distinguished from public law; and iii- in a civilian legal system, that part of private law applicable to persons concerning property, family, succession and so on, as distinguished from, for instance, commercial law.

⁶⁹⁴Basil Markesinis, "Comparative Law - A Subject in Search of an Audience", (1990) 53 MLR 1, 2.

Thus, in a strange way the comparative method may have more of a future by penetrating other subjects than by trying to assert its own continued independence under the unconvincing title of comparative law. Even staunch supporters of what I have described as the old approach detect in this phenomenon a way of rekindling interest in foreign law. I certainly do.⁶⁹⁵

Sir Otto Kahn-Freund wrote, in the context of EU law, that an awareness of the contrasts between the legal orders is a first step in the direction of harmonisation, and his comments apply well to European human rights law:

We are here concerned not with Community Law, but with a "European common law", and I consider the articulation of the contrasts in interpretation, the awareness of these contrasts, and a mutual adjustment to different methods as among the most significant requirements for a measure of harmony and among the most difficult to achieve. To make an obstacle articulate is the first step towards overcoming it.⁶⁹⁶

1. The general structure of the system

1.a. The legal sources and their handling

Although in some areas the common law and the civil law are gradually moving closer, yet the point of complete assimilation has not been reached and, of course, it may never be reached. Civil law judges⁶⁹⁷ tend to look first at the enacted legislation and then at their colleagues' decisions, because the *jurisprudence*, although very important, is placed "behind" statutory law in the hierarchy of sources. On the other hand, in the common law world there is a tendency for statutes to

⁶⁹⁵Basil Markesinis, *op. cit.*, 21.

⁶⁹⁶Otto Kahn-Freund, "Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation", in: Mauro Cappelletti (ed.) New Perspectives for a Common Law of Europe, (1978), 158.

⁶⁹⁷J. Cueto-Rúa, "The Future of the Civil Law" (1977) 37 La. L. Rev. 645, 656.

"supplement" the common law and to be very clear when they displace a common law rule.⁶⁹⁸

One of the comparative problems for the Strasbourg Court was how to treat all member states in the same way vis-à-vis the different treatment the traditions assign to the sources of law. The difference between the common law and the civil law survives in the different value attributed to precedents among the sources of law.⁶⁹⁹ For example, the common law member states would have been discriminated against in the *Sunday Times Case (No. 1)*⁷⁰⁰ if an institution such as contempt of court would have been declared not to satisfy the conditions of accessibility and foreseeability of an interference "prescribed by law" for the sole reason that it was not set down in statutory form.⁷⁰¹

The case concerned an injunction restraining publication of one article by the Sunday Times dealing with the history of the testing, manufacture and marketing of the drug thalidomide by Distillers, on grounds that it would constitute contempt of court. The article was intended to assist the parents of children born with deformities caused by the drug in obtaining a better settlement of their actions. A sharply divided European Court decided that the injunction was not a justified interference and therefore, found the United Kingdom in breach of Article 10 (2) ECHR.

⁶⁹⁸Sir William Dale, "The European Legislative Scene", (1992) 13 Stat. L. R. 79, 88.

⁶⁹⁹Ugo Mattei, Common Law: Il diritto anglo-americano, (1992), 235.

⁷⁰⁰(1979-80) 2 EHRR 245, para. 47. Relevant for the study of this case are: Harvey Teff and Colin R. Munro, Thalidomide the legal aftermath, (1976) and P. J. Duffy, "The Sunday Times Case: Freedom of Expression, Contempt of Court and the European Convention on Human Rights" (1980) 5 HR Rev. 17.

⁷⁰¹J. J. Cremona, "The interpretation of the word "law" in the jurisprudence of the European Court of Human Rights", Selected Papers 1946-1989, (1990), 188, lists various cases where the word "law" occurs.

The Court acknowledged the comparative issue when it said that deciding otherwise would have struck at the bed-rock of the English legal system. It would have also been contrary to the European ideal of the drafters of treating all member states equally. For these reasons, it did not matter to the Court that the law of contempt was laid down in previous court decisions:

... 'law' in the expression 'prescribed by law' covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of common law and not of legislation. It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation: this would deprive a common law State which is party to the Convention of the protection of Article 10 (2) and strike at the very roots of that State's legal system.

As a result, the Court deployed a fully transplantable argument, that "law" in the phrase "prescribed by law" covers statute and unwritten law.

Let us now turn our attention to two French cases which mirror this case from the other side of the divide of the legal traditions. The Court applied, however, the same *Sunday Times* standard on the meaning of "law" in *Kruslin v. France* and *Huvig v. France*. In April 1985 the Indictment Division of the Toulouse Court of Appeal committed a Mr. Kruslin for trial at the Haute-Garonne Assize Court on charges of aiding and abetting a murder, aggravated theft and attempted aggravated theft. One decisive piece of evidence was the recording of a conversation with a person whose telephone was being monitored in connection with other proceedings under another investigating judge. The Court of Cassation dismissed an appeal filed by Mr. Kruslin.

The other case concerned a Mr. Huvig, who ran a business with his wife and was accused of tax evasion, failure to make entries in accounts and false accounting. An investigative judge asked the police to monitor the Huvigs' telephone calls. The telephone tapping took place for a period of 28 hours. A first instance court convicted the couple in March 1982, and the Dijon Court of Appeal upheld the convictions and increased the sentences. The Court of Cassation dismissed an appeal by the complainants.

The excerpts quoted in the following paragraphs are from *Kruslin*: the judgments in both cases are almost identical in the matter that concerns us. In both cases the European Court was asked whether the expression "in accordance with the law" within the meaning of Article 8 (2) ECHR had had a legal basis in French law. The French Government submitted that by "law" the Court should understand the law in force in a given legal system in addition to the case law interpreting it. The delegate of the Commission, Mr. Treschel⁷⁰² challenged this interpretation and disputed the possibility of transplanting the standard developed in *Sunday Times* advancing the comparative law argument that "... in the case of the Continental countries, including France, only a substantive enactment of general application - whether or not passed by Parliament - could amount to a 'law' for the purposes of Article 8 (2) of the Convention." He pointed out that when the Court held that "the word 'law' in the expression 'prescribed by law' cover[ed] not only statute but also unwritten law" it was thinking of the common law system, and he went on to say that "That system, however, was radically different from, in particular, the French system. In the latter, case law was undoubtedly a very important source of law, but a

⁷⁰²(1990) 12 EHRR 547, para. 28.

secondary one, whereas by 'law' the Convention meant a primary source."

The Court, however, insisted on the transplantability of standards and resorted to the same argument used in *Sunday Times (No.1)* to accomplish the result of finding a basis in French law for the interferences complained of, and this meant that "law" could meet the requirements of the ECHR even if it was based on previous court decisions in either the civil law or common law world:

French law, written and unwritten, does not indicate with reasonable clarity the scope and manner of the exercise of the relevant discretion conferred on the public authorities. This was truer still at the material time, so that Mr. Kruslin did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society.⁷⁰³

Finally, the comparative problem was further developed:

The term 'law' had to be understood in its 'substantive' sense not its 'formal' one. It includes enactments of lower rank than statutes, case law, etc. It would be wrong to exaggerate the distinction between common law countries and Continental countries. Statute law is important in common law countries and case law in civilian jurisdictions.⁷⁰⁴

Although in general the Court tends to follow the continental preference for statutory law over case law as a source,⁷⁰⁵ the requirements of accessibility and foreseeability of a "law" can be satisfied (or not) by either statute or case law, be it a civilian or a common law country, demonstrating that so far the Court was able to assimilate different systems. It is suggested that one reason for the preference for statutory law is the

⁷⁰³(1990) 12 EHRR 547, para. 36.

⁷⁰⁴(1990) 12 EHRR 547, para. 29.

⁷⁰⁵On Strasbourg's preference for written law see Chapter 6 of this dissertation.

continental legal background of the majority of the judges sitting in Strasbourg and also the fact that it may be more clear cut for an international body such as the European Court to check compliance with the ECHR in the case of statutes rather than domestic case law. Writing on the subject of the European organs, Judge Pettiti pointed out that in Strasbourg cases concerning the concept of "law" could be treated equally across the divide between the civil law and the common law:

We have issued an interesting decision on this principle because on this point in international law, we propounded this interpretation saying that in the same way that Anglo-saxon law can be considered as equal to a non-codified legislation, we can accept that a coherent body of *jurisprudence* as that of the French Court of Cassation is equivalent to the law itself even though the use of such a technical resource is not precisely codified.⁷⁰⁶

1.b. The legal system *per se* is affecting the human rights of the individuals

In the course of the proceedings the European Court comes into contact with the peculiarities of the legal systems of the member states and these can influence the process in various ways. For example, in a series of cases concerning transsexuals, the comparative problem for the Court was how to apply its standards to the essentially different administrative legal systems of France and England while treating them equally at the same time.

Unlike *Sunday Times* and the French telephone tapping cases, where the comparative law problem was discussed and resolved at a high level of abstraction (concerning

⁷⁰⁶Louis-Edmond Pettiti, "La Commission et la Cour européenne des droits de l'homme", in Les droits de l'homme et la nouvelle architecture de l'Europe, Mario Bettati et al. (eds), (1991) 35. On these two cases see: P. Lambert, "Les écoutes téléphoniques: arrêts Huvig et Kruslin c. la France, du 24 avril 1990, de la Cour européenne des droits de l'homme", (1990) *Journal des Tribunaux* 749.

the sources of law), the cases addressed here brought the Court into close contact with detailed administrative regulations. At this level, the outcomes were different according to the legal system of the member state concerned.

The human position of the applicants was very much alike, though, as all three allegedly suffered from *gender dysphoria syndrome*, had undergone gender realignment treatment and had already managed to obtain a degree of social recognition in their "new" identity. Although "there is no such thing as a true-sex change or a sexual metamorphosis"⁷⁰⁷ Professor J  rold L. Taitz explained that persons suffering from this medical condition may achieve psychological relief with appropriate medical treatment, and defined the condition known as *gender dysphoria syndrome* or transsexualism as being,

...a rare psychological condition recognised by the medical profession. A transsexual believes that he/she is a member of the opposite sex trapped in the wrong biological body. The syndrome may manifest itself in various neurotic or psychotic forms, leading even to suicide in extreme cases. Most medical specialists consider that the only relief for the condition is to align the transsexual's body with his psychological gender by way of "sex-change" surgery and hormonal treatment. After "sex-change" procedures the transsexual takes on the form of his/her post-operative sex. Although capable of having sexual intercourse in the same physical manner of their post-operative sex, transsexuals are incapable of procreation. "Sex-change" surgery is irreversible and presents a high percentage of risk factor to the health of the transsexual, as does the hormonal treatment.⁷⁰⁸

⁷⁰⁷ J  rold L. Taitz, "The Law Relating to the Consummation of Marriage Where One of the Spouses is a Post-Operative Transsexual", (1986) 15 AAL 141, 143. Incidentally, Judge S. K. Martens in his dissenting opinion in *Cossey* makes a reference to page 144 of this article where Professor Taitz reminded us that sex-change surgery is also available from female to post-operative male.

⁷⁰⁸ J  rold Taitz, "Transsexuals and Sexual Identity", (1988) 51 MLR 502, 502.

Several member states of the Council of Europe grant medical treatment for this affliction under their national health insurance system, as is the case of the United Kingdom.⁷⁰⁹ In those countries, it may be untenable nowadays to put the issue in the following terms: "Is it technically correct to use the terms fundamental human right to refer to one that is grounded not in human nature proper but in a psychological anomaly and in a subsequent surgical procedure, almost brutal and always artificial?"⁷¹⁰ Rather, to avoid inconsistencies and in the interest of impartial treatment of all citizens it follows that people in this situation may also be entitled to suitable alterations of their records under the prescriptions of Article 8 ECHR and even the right to marry under those of Article 12 ECHR. This was the legal relief the applicants sought in Strasbourg.

The similarities between the cases, however, ended at the point where the particular "otherness"⁷¹¹ of the legal systems involved percolated through the process of adjudication and became the single most important factor in determining inconsistent outcomes.

One ruling of the European Court reads: "attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex."⁷¹² In consequence, the biological sex criterion as used in the United Kingdom was deemed to be in line with the Convention. Citing the

⁷⁰⁹J. K. Mason and R. A. McCall Smith in "Butterworths Medico-legal Encyclopedia", at page 562 wrote that "...it is now generally agreed that sex change surgery is a legitimate form of therapy and it is one which is available under the NHS."

⁷¹⁰Javier Escrivá-Ivars, "Transexualismo y matrimonio. Comentario a la sentencia del T.E.D.H. en el caso Cossey", (1992) 2 Suplemento Humana Iura de derechos humanos 323, 346.

⁷¹¹This expression was taken from Csaba Varga, "European Integration and the Uniqueness of National Legal Cultures", 732, in: Bruno de Witte and Caroline Forder (eds.) The common law of Europe and the future of legal education, (1992), 721.

⁷¹²(1991) 13 EHRR 622, para. 43.

reasoning in its previous decision *Rees*⁷¹³, the European Court said in *Cossey* that Article 12 ECHR refers to the marriage between persons of the opposite biological sex; the purpose of such traditional approach being the protection of the institution of marriage as the basis of the family. Further, the right to marry was subject to existing national legislation and so long as any limitation laid out in those laws did not frustrate the right itself, then there was no basis for European intervention. In the Court's understanding of the case at hand, the legal impediment set out in domestic law could not be said to have had such a frustrating effect, therefore the British government was not requested to alter the basic makeup of its record system so as to accommodate this type of entry. The United Kingdom record system was designed to enter historical information. Corrections of an initial error of fact could be made but this was obviously not the situation of Mr. Rees or Ms. Cossey. For this reason, the European Court arguably shied away from shaking the whole structure of the English civil registration system: "to require the United Kingdom to follow the example of other Contracting States is from one perspective tantamount to asking that it should adopt a system in principle the same as theirs for determining and recording civil status".⁷¹⁴ The space of time between *Rees* and *Cossey* was short. Perhaps this time factor contributed to persuade the Court that it should resort to the same pattern of reasoning and refuse to distinguish the latter from the former case all with the result that it allowed again the same respondent government a wide margin of discretion in the matter:

There have been certain developments since 1986 in the law of some member States of the Council of

⁷¹³On this case, see: J  rold L. Taitz, "The Legal Determination of the Sexual Identity of a Post-Operative Transsexual Seen as a Human Rights Issue", (1989) 7 *Medicine & Law* 467.

⁷¹⁴(1986) 9 EHRR 56, para. 42.

Europe. However, the reports accompanying the resolution adopted by the European Parliament on 12 September 1989 (OJ No. C 256, 9.10.90 p. 33) and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989 -both of which seem to encourage the harmonisation of laws and practices in this field- reveal, as the Government pointed out, the same diversity of practice as obtained at the time of the Rees judgment. Accordingly, this is still, having regard to the existence of little common ground between the Contracting States, and area in which they enjoy a wide margin of appreciation (...) it cannot at present be said that a departure from the Court's earlier decision is warranted in order to ensure that the interpretation of Article 8 on the point at issue remains in line with present-day conditions.⁷¹⁵

Judge Martens pointed out in his dissenting opinion in *Cossey*⁷¹⁶ that the essence of Mr. Rees' complaint had shown not long before that "the legal system in force in the United Kingdom (the BSD-system)⁷¹⁷ was inconsistent with his rights under Article 8 of the Convention" and also, probably stressing the argument, that "The very existence of such a legal system must continuously, directly and distressingly affect their private life". If a community is oppressing an individual, then it may be necessary to generate "top-down" change from Strasbourg:

(...) one gets the impression that the Court, at least as far as family law and sexuality are concerned, moves extremely cautiously (...) In my opinion, this caution is not consistent with the Court's mission to protect the individual against the collectivity and to do so by elaborating common standards. (...) the Court should take great care not to yield too readily to arguments based on a country's cultural and historical particularities.⁷¹⁸

⁷¹⁵(1991) 13 EHRR 622, para. 40.

⁷¹⁶(1991) 13 EHRR 622, Judge Martens' dissenting opinion, para. 3.4.

⁷¹⁷*BSD-system*: the system that holds that only **B**iological **S**ex is **D**ecisive, that is, the chromosomal factor is the only relevant foundation to determine gender.

⁷¹⁸(1991) 13 EHRR 622, Judge Martens' dissenting opinion, para. 5.6.3.

This brings us to the comparative problem again, and how it determined a different finding in the French case *B. v. France*. Although the Court distinguished it from *Rees* and *Cossey*, the judges did not acknowledge that the outcome was similar to that advocated by the dissenting opinion of Judge Martens in *Cossey*⁷¹⁹. The judgment found it essential to delve into the details of the administrative systems involved in the instant case and the precedents running a brief comparative study of the French and the English legal systems under the title "The differences between the French and English systems"⁷²⁰. The gist of the comparison was that, unlike an English birth certificate, a French one was intended to be updated throughout the life of the person concerned. As a consequence, the Court said that the correction requested by Ms. B. had to be made since it would only amount to an update of the register without any need to introduce alterations in the established arrangement of the registration system as a whole.⁷²¹ It did not escape the attention of the Court that numerous French courts of first instance had already ordered similar insertions in the register in the past without hardly ever being challenged by the *Procureur's* office. Only the Court of Cassation's *jurisprudence* had adopted the contrary position, but the European Court understood that this could be readily changed.

The cases produced conflicting decisions; *Cossey* supporting the United Kingdom policy of no changes to the records; *B. v. France* rejecting it with regard to another member state, despite the fact that the factual

⁷¹⁹Separate Opinion of Judge Martens: "Since I fully maintain the views expounded in my dissenting opinion in the *Cossey* case, I acclaim the Court's decision, but cannot subscribe to all its arguments (...)"

⁷²⁰(1993) 16 EHRR 1, paras. 49 to 51.

⁷²¹See "France" in Chapter 3 "The effect of the European law of human rights on the member states": on December 11, 1992, the Court of Cassation in *René X. and Marc X.* quashed two decisions of the Appeal Court of Aix-en-Provence and ordered the substitution of "female sex" for "male sex" in the applicants' birth certificates.

circumstances did not differ greatly, only the national law was different. Although the European Court applied the same ECHR standards and relied on its own case law, the "otherness" of the legal systems of the member states permeated through. The comparative point being made is that the case law of the Court was unable to absorb the differences between the national legal systems whose underpinnings pulled in very different directions and which determined in the end, that in one case the rights of a person were protected but not in the other. The Court simply could not create a remedy where it was not available.⁷²² Following the tendency to give a wider margin of appreciation to the member states in questions concerning morals, the Strasbourg institutions abstained from requesting changes of policy and legal practice. The situation may change in the future, and support for one *jurisprudence* to be shared on equal terms by all member states may gain momentum in this particular field. If another British case reaches Strasbourg in the future, the solution may be more in line with the French case. A different composition of the Court may have an influence on this too.

2. The procedural law of the member states

Although European national legal systems share many principles, at least at the highest level of abstraction, fundamental differences between them are revealed, however, when we turn to the institutional structure through which their norms are applied or many other details, such as the assumptions behind legal thought. More specifically, their typical mode of thought in procedural matters is different, and these differences present the European Court with comparative problems when

⁷²²See Chapter 6 for the effect of these conflicting decisions on the effect of the *jurisprudence constante* in Strasbourg.

it is called to decide whether certain specific procedural law practices violate the rights protected by the ECHR.

Let us devote our attention to a few Swedish cases in Strasbourg. These cases concerned whether a public hearing was required on appeals when both matters of law and fact were at stake. The comparative problem appeared when the handling of the issue of the hearing in Swedish law encountered the requirements of Article 6 (1) ECHR.

In *Ekbatani v Sweden*, the applicant, Mr. John Ekbatani, a United States citizen, arrived in Sweden in 1978 to do research at the University of Gothenburg. Due to financial difficulties he sought employment with the Gothenburg Tramway Company but when he failed the Swedish driving test he had an angry exchange of views with the traffic assistant in charge of the test. The police questioned him in this connection and he was charged with the offence of threatening a civil servant. At the trial hearing both the applicant and the traffic assistant were heard, Mr. Ekbatani was found guilty and a fine was set. He appealed, but the Court of Appeal confirmed the City Court's judgment. The Supreme Court refused leave to appeal.

The European Court followed an approach similar to the common law in order to find that "there were no special features to justify a denial of a public hearing"⁷²³ and that therefore the ECHR had been violated:

In the circumstances of the present case that question could not, as a matter of a fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant -who claimed that he had not committed the

⁷²³(1991) 13 EHRR 504, para. 33.

act alleged to constitute the criminal offence- and by the complainant⁷²⁴

In *Helmerts v. Sweden*⁷²⁵ the question was also whether an Appeal Court could refuse a hearing when issues of law and fact (new evidence had been introduced) were discussed on appeals. The European Commission said that Mr. Helmers should have been allowed to state his case at a hearing.⁷²⁶ *Helmerts* concerned a private prosecution for defamation in addition to an action for damages originating in a dispute over the University of Lund's decision not to appoint the applicant to an academic post. Mr. Helmers had appealed to the National Board of Universities and Colleges against the decision which he thought was biased. The Board requested a specially established university committee to submit a written opinion. Mr. Helmers considered that some statements made in the opinion amounted to defamation and reported the matter to the police, but the Chief District Prosecutor chose not to bring charges. The applicant then brought a private prosecution against one member of the university committee and his secretary. There was a hearing before the Lund District Court. Mr. Helmers's private prosecution was dismissed and he appealed to the Court of Appeal, which upheld the lower court decision without allowing a hearing. The Supreme Court of Sweden refused leave to appeal.

The European Court, however, gave the issue a consideration more in line with a common law treatment and found that a hearing would have been in order before the Court of Appeal:

... taking into account the seriousness of what was at stake for the applicant, namely his professional

⁷²⁴(1991) 13 EHRR 504, para. 32.

⁷²⁵(1993) 15 EHRR 285.

⁷²⁶(1993) 15 EHRR 285, para. 33.

reputation and career, the Court finds that the question of the defendants' guilt could not, as a matter of fair trial, have been properly determined by the Court of Appeal without a direct assessment of the evidence given in person by Mr Helmers and by the defendants, who claimed that they were innocent of the accusations brought against them.

In *Jan-Åke Anderson v. Sweden*⁷²⁷ and *Fejde v. Sweden*⁷²⁸ the Court, however, found that a hearing was not necessary, and thus, the cases were distinguished from *Ekbatani* in a way familiar to common lawyers.⁷²⁹ *Fejde* and *Anderson* were simple cases, one involving a traffic violation (driving a tractor on a highway) and the other involving the possession of an unusable weapon. Both applicants were convicted following public trials where they had pleaded not guilty. On appeal, they complained of defects in their trials, including the assessment of the evidence and also about the severity of the sentences. Their appeals were rejected without a hearing as the courts of appeal relied on written submissions.

As regards the right to a hearing itself, the judgments given by the European Court show the application of the common law inspired criteria of Article 6 ECHR mixed with civilian "qualifying" values. The Court recognised that it was not always necessary to grant the same rights on appeals as before the first instance court to satisfy Article 6 ECHR. The Court followed an approach similar to the continental position in this matter, which also was that of the Swedish domestic courts, and held that there was no breach of the ECHR. The judgment was based on the fact that the issues on which the applicants had sought a hearing and claimed a *de novo* assessment of the evidence would not have been decisive for the outcome of the appeal. The offences were minor and the convictions

⁷²⁷(1993) 15 EHRR 218.

⁷²⁸(1994) 17 EHRR 14.

⁷²⁹Wilson Finnie, "Jurisprudence of the European Court of Human Rights 1991", 1992 Juridical Review 287, 295.

of no great seriousness. Although civilian judges might be prepared to draw a distinction between important and unimportant cases, where the need to hear the defendant appears less pressing, such civilian approach stands apart if contrasted with Judge Cremona's dissenting opinion. Following the common law principle that a hearing is habitual particularly where questions of both fact and law were in dispute, Judge Cremona said in *Fejde*: "In the circumstances, the appellate court's re-examination required a public hearing in order to comply with Article 6 § 1 of the Convention. As this was not allowed, there was in my view a violation of that provision."⁷³⁰ Incidentally, this dissenting opinion is close to the reasoning of Judge Walsh in the German case *Hennings*⁷³¹, where the Irish judge's reasoning on the need to grant a hearing without the state limiting the right unilaterally bore no resemblance with the majority's views.

A common "language" on the right to a hearing was missing. The differences between the legal traditions can be quite substantial and the centrifugal force of these differences may not be easy to assimilate under a single European law of human rights. Yet again, to a degree because of the ECHR, many differences between the civil law and the common law have faded away, but the Anglo-American approach to criminal procedure still differs fundamentally from the civilian technique⁷³² or from that of the mixed legal system of Sweden for that matter. This provides evidence of their strength and persistence.

⁷³⁰(1994) 17 EHRR 14, Cremona's dissenting opinion.

⁷³¹Discussed in Chapter 10.

⁷³²J. A. W. Lensing, "Some Thoughts on Criminal Law and Procedure, European Integration and Legal Education", in Bruno de Witte and Caroline Forder (eds.), The common law of Europe and the future of legal education, (1992), 380.

3. The rules of evidence in the member states

The two procedural traditions prevalent among the member states are worlds apart on the ways evidence is elicited and brought to the notice of the judge. Added to all this, Article 6 ECHR is cast in the mould of a clearly adversarial spirit, so tensions arise when its prescriptions are applied to criminal procedure in civil law systems. Incidentally, it has been speculated that the different footings of some sections of the ECHR and those of some aspects of French law may explain in part France's delay in ratifying the ECHR and granting the right of individual petition, as "(...) the Convention was too much influenced by anglo-saxon legal thinking although the French lawyers René Cassin and Pierre Teitgen are among the most influential founding fathers."⁷³³

The comparative problem led us to revisit the distinction between inquisitorial and adversarial procedures. It may be objected that the distinction is today deceptive, on grounds that there are gladiatorial elements in the procedural law of a civilian country and the opposite observation can be made equally in the common law world. A caricature of what are inquisitorial or adversarial proceedings will certainly be of no help. Nonetheless, where the principles underpinning a legal institution point in one or the other direction, these tendencies have an effect on the outcomes. Admittedly, "each system of criminal justice is driven to compromise principles"⁷³⁴, but since compromises can be made up of different combinations of principles, it is possible to

⁷³³Jochen A. Frowein, "The ECHR and the Public Order of Europe", in: Andrew Clapham and Frank Emmert (eds.), Collected Courses of the Academy of European Law: 1990. Vol. I Book 2. (1992), 286, footnote 66. See, also, Chapter 4 of this dissertation.

⁷³⁴Abraham S. Goldstein and Martin Marcus, "The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany", (1977-1978) 87 The Yale Law Journal 240, 283.

detect leanings towards one tendency or the other in concrete situations. Some national institutions have to yield ground to the Convention requirements in order to safeguard a Convention-protected freedom.

The adversarial spirit of some parts of the ECHR cannot work easily with some civilian institutions. Take the specific *por reproducida* (as reproduced) procedure in the case *Barberà, Messegue and Jabardo v. Spain*.⁷³⁵ At a hearing before a Spanish trial court 1,600 pages of the file of the investigation were considered as having been read out in court while in fact they were not although they were admitted as evidence. The three applicants, allegedly members of a Catalan separatist organisation, were convicted by the *Audiencia Nacional* of the murder of a businessman, a Mr. Bultò. The respondent government deployed a civilian argument to justify the *por reproducida* procedure: that criminal procedure in Spain is not concentrated in one single trial hearing as in a common law jurisdiction. It is clear that the Spanish government and Article 6 ECHR were speaking different "languages" of criminal procedure. Article 6 (1) ECHR implies openness, publicity and equality of the parties to a case.

The Spanish procedure plainly clashed with the requirements of due process of Article 6 ECHR in the European Court's view. For the majority the adversarial requirements embodied in the "equality of arms" principle had not been met. The Court⁷³⁶ found, *inter alia*, that the trial had been too brief and important pieces of evidence had not been discussed in the applicants' presence and under public scrutiny. The *por reproducida* procedure appeared as unfair and had to give up ground to the safeguards of Article 6 ECHR:

⁷³⁵(1988) 11 EHRR 360.

⁷³⁶(1988) 11 EHRR 360, para 89.

... According to the Court's established case law, waiver of the exercise of a right guaranteed by the Convention -in so far as it is permissible- must be established in an unequivocal manner. While the use of the *por reproducida* procedure showed that the defence accepted that the contents of the file need not be read out in public, it cannot be inferred from this that it agreed not to challenge the said contents even where the prosecution relied on them ...⁷³⁷

The joint concurring opinion of judges Lagergren, Pettiti and Macdonald threw more light on the issue when they pointed out that the Spanish *Audiencia Nacional's* "judgment imposed heavy sentences on the applicants" but "...contained no analysis of the evidence that had been taken or of its connection with the facts deemed to have been established..." The issue should be connected to the fact that two judges at the Spanish *Audiencia Nacional* had been substituted at short notice, so the defence lawyer had grounds for fearing that the new judges would be unfamiliar with the 1,600 pages of the investigation file which could raise reasons for concern in view of the system of evaluation of evidence used in Spain, where the government alleged that "...short reasoning was now common practice in systems based on the judge's personal belief, such as Spain's..." The eight dissenting judges⁷³⁸, however, adopted an approach closer to the civilian procedural tradition and thought that this case was about a matter of procedural expediency and therefore, the Spanish procedure was not out of step with the ECHR. They based their dissent on three points: (a) they did not consider that all the documents in a trial should be communicated to the public; (b) the public in this case had free access to the courtroom and (c) the public had the opportunity to hear the defence consent to the use of the *por reproducida* procedure.

⁷³⁷(1988) 11 EHRR 360, para. 82.

⁷³⁸(1988) 11 EHRR 360, dissenting opinion by Judge Bindschedler-Robert *et al.*

Take another case. The comparative problem is similar as it concerned a national practice grounded on assumptions incompatible with those of the ECHR. In the *Unterpertinger*⁷³⁹ case proof was based exclusively on statements of witnesses made to the police in writing. The European Court decided that this was in breach of the defendant's rights to cross-examine them. Yet this practice is common in most civilian systems. Cross-examination is essentially alien to an inquisitorial tradition where the accent is placed on the written procedure.

Consider, for example, *Kostovski v. the Netherlands*.⁷⁴⁰ The applicant was convicted of armed robbery only on the basis of sworn statements by two anonymous witnesses. Although in a civilian jurisdiction the defence lawyer may call witnesses, the court itself will do the questioning, because witnesses are usually witnesses *tout court*. As far as Article 6 (1) ECHR is concerned, there are witnesses for the defence and the prosecution, however, and a defendant is always entitled to cross-examine them. To defend its position, the Dutch government argued that although there was no strict compliance with Article 6 ECHR, any anomalies were justified by the express or implied limitations laid down in paragraph 3.⁷⁴¹ The test of the Court was to ask whether the deviation from the ECHR standards had affected the applicant's right to a fair trial paragraph 1 of the same article. The answer was in the affirmative. The applicant had not had sufficient opportunity to exercise his rights with respect to the anonymous

⁷³⁹(1991) 13 EHRR 175.

⁷⁴⁰(1990) 12 EHRR 434.

⁷⁴¹Article 6 (3) (d) ECHR: (...) Everyone charged with an offence has the following minimum rights: (...) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (...)

witnesses. As the Court had established in the *Unterpentiger v. Austria*⁷⁴², "... an accused should be given adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings."⁷⁴³

Judgment was passed against the defendant governments in all these cases. Writing in 1991, H. F. M. Crombag⁷⁴⁴ reported that after *Kostovski* the Dutch authorities did no more than patching up the status quo.⁷⁴⁵ Some practices and traditions are very ingrained in a legal system and change may be resisted. The situation may incidentally justify the conclusion that "transplants" if not "rejected" may at least take time to "grow".

The pattern in the case law shows "sideways" transplants between the legal traditions performed by means of the comparative method. Nonetheless, although there is a promotion of harmonisation and approximation of the legal systems of the member states, the powers of the Convention in that direction are relatively weak; therefore divergencies continue. The European Court is apparently not moving towards a single "European" system but slowly trying to set down limits for the member states.⁷⁴⁶ The transfers of values between the legal traditions work both ways. For example, in *Kostovski* the European Court rejected the government's arguments asking

⁷⁴²(1991) 13 EHRR 175.

⁷⁴³(1990) 12 EHRR 434, para. 41.

⁷⁴⁴Hans F. M. Crombag, "On the Europeanisation of Criminal Procedure" in Bruno de Witte and Caroline Forder (eds.), The common law of Europe and the future of legal education (1992), 410.

⁷⁴⁵Among the manoeuvres, H. F. M. Crombag mentions the apparent defence of the status quo by the recommendations of a committee appointed by the Minister of Justice and also the arguments of the Advocate-General before the Dutch Supreme Court suggesting the use of anonymous witnesses by the police and thus almost ignoring the meaning of *Kostovski* altogether.

⁷⁴⁶Colin Warbrick, "The European Convention on Human Rights", (1989) 9 YEL 385, 411.

sympathy for an inquisitorial process, and in *Brogan*,⁷⁴⁷ it did not accept the British government's argument that it had not been sympathetic enough to the special requirements of an adversarial system.

Conclusions

The purpose of the chapter was to carry out a review of European Court cases applying the comparative method as a tool of study. A comparative test, therefore, based on "differentiating factors" was used to make the common law and civilian elements present in the interpretation of Convention law visible in individual European Court decisions. (This method will be applied in the next two chapters as well.) The comparative problems were studied in the following areas: in the general structure of the legal system of the respondent member state (considering the legal sources and their handling and the cases where the legal system *per se* is affecting the human rights of the individuals), in the procedural law and linked to the procedural approaches, the rules of evidence. On some occasions the comparative problem appeared as an intricate question of domestic law which the Court had to decide and, if possible, make provisions for a remedy, as in the vagrancy cases. In several occasions, a country's answer to a legal question headed for a collision with a requirement of the ECHR inspired by a different legal tradition.

With regard to the transferability of standards, it is apparently easier for the Court to treat member states equally if working at a high level of abstraction, such as the concept of "law" which covers both written and unwritten sources. Sometimes, however, the Court could

⁷⁴⁷To be discussed in the next chapter.

not transfer standards, such as in the case of some detailed administrative features of a legal system. The contrast therefore is between the possibility of identifying principles at the highest level of abstraction and fundamental differences between administrative practices in the member states.⁷⁴⁸ This is what happened in the cases of concerning the transsexuals, where the legal systems of the member states in the end were instrumental in determining conflicting answers in Strasbourg.

The process of decision making is also affected by other differences between the member states, for example considerations of policy, the doctrine of the margin of appreciation, the weak harmonisation powers in Convention law and so on,⁷⁴⁹ which altogether sometimes manage to overwhelm the harmonising intentions of the Strasbourg institutions.⁷⁵⁰ Although now and then the rulings of the Court fail to spur the desirable reforms in the domestic jurisdictions, the Convention institutions have been setting down markers for the behaviour of the member states and their cumulative effect may have a harmonising effect in the long run.

⁷⁴⁸Cees Flinterman, "European Legal Education in the Future: Some Concluding Observations" in Bruno de Witte and Caroline Forder (eds.), The common law of Europe and the future of Legal Education, (1992), 115.

⁷⁴⁹Topics dealt with in Chapter 7.

⁷⁵⁰More cases dealing with national law institutions rooted in a tradition incompatible with the footings of a section of the ECHR will be considered in the next two chapters.

Decision-making and interpretation in Strasbourg

Comparative law analysis of
the case law of the
European Court of
Human Rights.

(3rd. part)

Introduction

This chapter should be seen as a continuation of the comparative analysis started off in the previous one. As was the case there, here again we should keep in mind the idea that despite the convergences between the legal families and the legal systems, very important differences persist which have a considerable impact on the interpretation of the European Convention.

The majority of the cases taken into consideration deal with procedural institutions or practices which are peculiar to a legal system or to a family of legal systems. The points of divergence will appear as incompatibilities between the assumptions on which these institutions or practices are based and the underpinnings of a particular section of the ECHR. Although most of the institutions discussed are from civilian legal systems, the study of disagreements between common law institutions and the ECHR are not excluded.

4. Institutions particular to the legal system of a member state

In this context, the word "institution" refers to a legal concept, principle, rule, doctrine or organ which is peculiar to a legal order or tradition. A high proportion of Strasbourg work is devoted to the tensions between the characteristic approaches of a legal tradition - as they appear in the underpinnings of an "institution" - running into an ECHR which is not "neutral." For example, the common law inspired⁷⁵¹ section I of the ECHR clashes with some civilian institutions such as aspects of the *Ministère Public*, the submission of a draft ("*croquis*") of the decision by the Prosecutor to the court or the use of one single "file" with all the written proceedings in a case. Interestingly enough, and giving further evidence of the "mixed" nature of Strasbourg law, a similar tension has been reported in other "mixed" or "bicultural" jurisdictions, such as Louisiana and Quebec. Cases taken to their respective federal Supreme Courts raise the issue of one tradition imposing its standards on the other, as cases coming from the "different" (civilian) tradition may not stand many chances of "survival" in a court dominated by the values of the common law. In Canada, a high percentage of reversals in Charter of Rights cases in appeals to the Supreme Court from the Quebec Court of Appeal, may be attributed to reasons which may be "(...) unclear, but may be linked to the civil law training and orientation of the judges on the Quebec Court of Appeal as opposed to the common law orientation of the majority of Supreme Court of Canada

⁷⁵¹Judge Zekia's dissenting opinion in *Wemhoff v. Federal Republic of Germany* (1979-1980) 1 EHRR 55, para. [16] and Stefan Trechsel, "The Right to Liberty and Security of the Person - Article 5 of the European Convention on Human Rights in the Strasbourg Case-Law", (1980) 1 HRLJ 88, 89.

Justices.”⁷⁵² Moreover, a similar observation was made as regards Louisiana. H. J. Abraham⁷⁵³ wrote that “(...) it is interesting to note that more statutes of the State of Louisiana have been declared unconstitutional than those of any other state, Louisiana being the only one of the fifty to employ *civil law* as its judicial [sic.] system.” On the other hand, the Strasbourg system, as has been said of the legal system of Louisiana,⁷⁵⁴ is a laboratory for discovering whether the different methodologies of the traditions produce different substantive outcomes and offers the opportunity to examine the role of the form of a legal system in shaping the law.

Let us look at whether some civilian institutions could be considered “fair” if they are tested according to common law concepts. Articles 5 and 6 ECHR are liable to stress procedural fairness over the civilian ideal of finding out the actual truth and therefore relegating the role of fairness as a limit on the means of investigation rather than an aim in itself.⁷⁵⁵ These divergent assumptions of the traditions lead to other differences, such as the diverse types of public prosecution systems or the role of the police in the different member states. Those dissimilarities are an obstacle for the establishment of a uniform system of criminal justice in Europe. For now, the only harmonised element appears to consist of some principles used by the Court as a benchmark, and some civilian institutions have been failing the test.

⁷⁵²F. L. Morton, Peter H. Russell, and Michael J. Withey, “The Supreme Court’s First One Hundred Charter of Rights Decisions: A Statistical Analysis”, (1992) 30 Osgoode Hall Law Journal 1, 19.

⁷⁵³Henry Julian Abraham, The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France, (1986), 293.

⁷⁵⁴Kenneth M. Murchison, “The Judicial Revival of Louisiana’s Civilian Tradition: A Surprising Triumph for the American Influence”, (1988-1989) 49 La. L. Rev. 1, 34.

⁷⁵⁵Stefan Trechsel, “The Right to Liberty and Security of the Person - Article 5 of the European Convention on Human Rights in the Strasbourg Case-Law”, (1980) 1 HRLJ 88, 90.

4.1. The *Ministère Public*:

It is often asserted that the presence of a public official in charge of initiating and conducting prosecutions is the hallmark of an inquisitorial legal system. National differences are significant. Prosecutors enjoy various degrees of discretion in different systems, from very little in a system guided by the principle of legality like the German or the Italian⁷⁵⁶ to a very wide one in England and Wales where in principle there is no state monopoly on prosecution. In England, the Director of Public Prosecutions (DPP) was created to replace the jury of indictment but its role is very different from a continental *procureur*:

From the twelfth till the twentieth century the jury of indictment operated continuously in England, but in 1933 it was abolished. Its place was not taken by some continental-style crown-procurator, however, but instead a different and rather remarkable novelty was introduced, the Director of Public Prosecutions. He was indeed an official of the state, who had to decide, on the basis of material provided by the police, whether to prosecute or not - a role comparable to that of the *procureur* - but unlike the latter, he did not appear in court, did not plead there against the accused or request the latter's condemnation. This task was left to a barrister, an advocate who for a fee would undertake to plead for the crown against the accused just as on another day he might accept the defence of a suspect. Barristers were members of the bar and not state officials (although some might come to specialise in prosecution work). So much for the absence of a *Ministère Public* in England.⁷⁵⁷

Several criminal law systems grounded on an adversarial philosophy have adopted public prosecutors, though, such as Scotland, and outside the Council of Europe system, Canada and the United States. The Scottish prosecutors,

⁷⁵⁶Susan R. Moody and Jacqueline Tombs, Prosecution in the Public Interest, (1982), 13.

⁷⁵⁷R. C. van Caenegem, Judges, Legislators and Professors: Chapters in European Legal History, (Goodhart Lectures 1984-1985), (1987), 35.

like their continental counterparts, have a duty to disclose any facts favourable to the accused ignored by the defence.

This brings us to the question whether an "inquisitorial" institution such as the *Ministère Public* of many civilian countries, for example Belgium or others that borrowed French institutions, can comply with the guidelines of the ECHR. Although Strasbourg accepts that a fair trial can be achieved in several ways, there are nevertheless certain basic tenets laid down in the ECHR that seem to be absent from the law of some member states. Let us look at the issue in the cases *Delcourt* and *Borgers* where the role of the *Avocat Général* before the Belgian Court of Cassation was discussed.

In Belgian law, the main function of the *Avocat Général* is to act as an independent adviser to the court and make recommendations as to the outcome to the case. This official is part of the *Procureur Général's* department within the *Ministère Public*. In the two cases mentioned, the difficulty with this institution in relation to the ECHR was the presence of those officials⁷⁵⁸ during the (domestic) courts' secret deliberations while the private parties and their attorneys were excluded. The problem was, therefore, that such national practice cast doubts on the availability of the due process of law to criminal defendants. This situation was especially worrying in criminal cases where the government was also a party to the litigation. In contrast, the legal idea behind the ECHR was very different. The Convention required that both parties have a comparable opportunity to explain their respective positions; the ECHR's "ideal" system was one where the judge was an umpire and the prosecution an

⁷⁵⁸The function of the government lawyers appearing for the *Ministère Public* are to prosecute criminal proceedings and other actions to which the government is a party, and in addition, they can step in any other litigation to represent the public interest.

adversary to the criminal defendant. Neither the (national) judges nor the *Ministère Public* fulfilled those roles in these cases.

In *Delcourt v. Belgium*⁷⁵⁹, the applicant was convicted and sentenced for fraud and forgery. When the case reached the Court of Cassation, the opening hearing was attended by Delcourt himself and the representative of the *Ministère Public*⁷⁶⁰, whose recommendation to reject the appeal was accepted. On these grounds, Mr. Delcourt lodged an application with the European Commission claiming a violation of the "equality of arms" in December, 1965. The Commission declared the application admissible as it had accepted the complainant's belief that the recommendation made by the representative of the *Ministère Public* at the opening hearing had made him the applicant's opponent.

The best ruling from Mr. Delcourt's point of view would have been a declaration that Belgian criminal procedure was in breach of the ECHR in this matter but the judges ruled unanimously that it was not. The European Court agreed with the root idea put forth by the government and the finding was somewhat disappointing if seen through the model of criminal procedure supported by Article 6 ECHR: a distinction drawn between the appearances and the underlying principle enabled the Court to find that even if the appearances were incompatible with the "shared" law of Europe, the underlying principle was nevertheless congruent with the ECHR.⁷⁶¹ The Court seemed to have taken the civil law view that a (criminal) legal procedure is an inquiry into the (material) truth performed by a nonpartisan and rational adjudicator. The stress placed on finding the "truth" outbalanced in their view

⁷⁵⁹(1979-80) 1 EHRR 355.

⁷⁶⁰The official in this case was a member of the *Procureur général's* department.

⁷⁶¹W. J. Ganshof van der Meersch, "Reliance, in the Case-law of the European Court of Human Rights, on the Domestic Law of the States", (1980) 1 HRLJ 13, 24.

the formal parity in the standing of the parties, as required by a fair trial in the common law world.

For the European Court in *Delcourt* the *Ministère Public* was an independent official attached to a court as an assistant and adviser, and obviously impressed by the pedigree of the institution, it went on:

...the system now challenged dates back for more than a century and a half. While it is true that the long standing of a national legal rule cannot justify a failure to comply with the present requirements of international law, it may under certain conditions provide supporting evidence that there has been no such failure...

The solution was criticised in several scholarly writings with comments along the lines of the following: "from *Delcourt* a feeling can develop that controls provided by the Human Rights Convention remain on paper when certain "vested interests" are affected".⁷⁶² It can be observed that most of the Strasbourg judges were appointed from what it has been termed "secrecy" countries, where constitutional review of legislation by the courts had not been instituted or where, under the current procedural practices, there were no concurring and dissenting opinions attached to the judgments.⁷⁶³ Those elements may have also played an unacknowledged role in the way the issue was eventually decided.⁷⁶⁴

Added to all this, the Court did not give a direct answer to the question whether or not the *Ministère Public* was a party pursuing the interests of the government and if so, whether the official actually was the criminal

⁷⁶²Kurt H Nadelmann, Due Process of Law before the European Court of Human Rights: the Secret Deliberation, (1972) 66 AJIL 509, 524.

⁷⁶³Kurt H. Nadelmann, *id.*, 524.

⁷⁶⁴This issue is further developed in Chapter 10.

defendant's opponent.⁷⁶⁵ The question was answered in *Borgers*.

In *Borgers*, Strasbourg understood that the *Ministère Public's* intervention affected the applicant's position in the domestic trial, since he "becomes objectively speaking his ally or his opponent".⁷⁶⁶ A violation of Article 6 (1) ECHR followed because Mr. Borgers could not respond to the submissions of the *Ministère Public* made behind closed doors. On June 16, 1981, Mr. Borgers had appeared before the Antwerp Court of Appeal accused with forgery and the use of forged documents. He was fined and sentenced to six months' imprisonment but his conviction was suspended. Later the decision was quashed by the Court of Cassation and the case was remitted to the Ghent Court of Appeal for a new judgment. The court in Ghent re-stated the sanctions set in Antwerp, but a second appeal to the Court of Cassation failed.

Belgium, as in *Delcourt*, highlighted the respect for diversity of approaches: there were several different legal systems in Europe and their respective legal features were no reason to condemn them. This argument was, nonetheless, counterbalanced by the Europe-wide requirements of a fair trial.

The main point of difference between the approaches of the legal traditions in this case lies in their models of criminal procedure. The Belgian practice, from a common lawyer's perspective, seems an abnormality. Even the Memorial⁷⁶⁷ to the European Court filed by Belgium admitted that "The Belgian practice whereby the Public Prosecutor's department may be present, in a consultative

⁷⁶⁵Kurt H. Nadelmann, op. cit., 513.

⁷⁶⁶(1993) 15 EHRR 92, para. 26. On this case, see also: A. Wauters, "L'arrêt Borgers de la Cour européenne des droits de l'homme", (1992) 69 Revue de droit international et de droit comparé 125.

⁷⁶⁷Cour (91) 4, 19.

capacity at the deliberations of the Court of Cassation may very well appear "unusual" or "unsatisfactory" to lawyers from other legal systems, particularly common law systems".⁷⁶⁸ From a civilian viewpoint, however, the institution may not seem "unusual", especially if it is surrounded by guarantees and practices which arguably help to maintain the independence of the judges and the *Ministère's* officials. Judge Martens' dissenting opinion explained that the *Procureur* system was shared by a family of legal systems, and the European Court was dealing with its "Belgian variant." He also pointed out that the overruling of *Delcourt* "may affect the proceedings before the highest courts in several other member States"⁷⁶⁹ making an allusion to the fact that the institution under scrutiny was also a part of a legal tradition. His rehearsal of the practices of the *Ministère Public* in French, Italian and Dutch law could also be understood as an elaboration in that direction. On the other hand, it can be conjectured that because of his expertise on the institution of the cassation⁷⁷⁰ and the role of the *Ministère Public* as an "adjunct" or as an "extraordinary member" of the Court of Cassation,⁷⁷¹ he was inclined to support the fairness of the practice despite the appearances seemingly pointing in the other direction. He wrote:

I am familiar both with the appeal on points of law system and with the institution of the *procureur général* at a Court of Cassation. In my opinion the Belgian -and to a lesser degree the French variant of this system- is unfortunate. Since it only secures the benefits it implies when the *procureur général* and the court of cassation keep their distance from each other: this confers a greater freedom on both -the *procureur général* to propose new solutions and, if he thinks fit, to criticise

⁷⁶⁸Colin Warbrick, from a common lawyers' perspective, said : "It does!" in Colin Warbrick "The European Convention on Human Rights", (1991) 11 YEL , 566.

⁷⁶⁹(1993) 15 EHRR 92, Judge Martens' dissenting opinion, para. I.1.

⁷⁷⁰Judge S. K. Martens is also a judge at the *Hoge Raad*, the Dutch Supreme Court of Cassation.

⁷⁷¹(1993) 15 EHRR 92, Judge Martens' dissenting opinion, para. 2.4.

the case-law- the court to disagree. However, there are considerations of procedural expediency. I cannot help feeling that it is *disproportionate* to hold that the Belgian variant violates the very basic principles of *fair procedure* referred to in Article 6 § 1 of the Convention.⁷⁷²

Finally, his appeal to the European Court to pass judgments "that also convince those who are familiar with the procedural traditions of the respondent government"⁷⁷³ highlighted once more the tension, running through all the human rights systems, between the diversity of approaches versus harmonised practices and the creation of a European *jurisprudence* which can be shared by all the member states.

When the Court took the view that Mr. Borgers, however, had not had a fair trial, it was distancing itself from the substance of the institution and even its history in order to uphold a uniform approach of procedural fairness for all of Europe. Appearances were very important for the Court and the *Ministère Public* did not appear neutral, independent or impartial. In the words of the Court:

... Nevertheless the opinion of the *procureur général's* department cannot be regarded as neutral from the point of view of the parties to the cassation proceedings. By recommending that an accused's appeal be allowed or dismissed, the official of the *procureur général's* department becomes objectively speaking his ally or his opponent. In the latter event, Article 6 § 1 requires that the rights of the defence and the principle of the equality of arms be respected⁷⁷⁴

In doing so, did the Court impose the outlook of the common law embodied in Article 6 ECHR on that of the civil law? In taking this position, the judges adopted

⁷⁷²(1993) 15 EHRR 92, Judge Martens' dissenting opinion, para. 4.6.

⁷⁷³(1993) 15 EHRR 92, Judge Martens' dissenting opinion, para. 4.6.

⁷⁷⁴(1993) 15 EHRR 92, para. 26.

an approach similar to the adversarial ideal of the common law tradition. Under this light, Mr. Borgers and the representative of the *Ministère Public* had not been comparable contenders. Contests must be played fairly, and the essential feature of fair play is the formal⁷⁷⁵ equality of the contestants. In a "battle" the parties try to score points off each other because one can win at the expense of the other. The representative of the *Ministère Public* no doubt had a particular interest in having his view of the law (this was a cassation procedure) accepted by the Court of Cassation and therefore, it would be hardly surprising if he had strongly argued his case in the secret deliberations. The *Ministère Public's* advocacy in the absence of his opponent gave him the edge over the criminal defendant's position and might have indeed given the proceedings the appearance of a parody of a fair and public hearing.⁷⁷⁶

The European Court's attitude meant that a civilian practice was measured with a common law inspired conception of "due process" through the application of the ECHR. The adopted position was similar to the three-pronged benchmark of a satisfactory judicial trial in the common law world: the openness of the courts, the right to be heard, and the impartiality of the judge. These elements are usually summarised in the often quoted maxim⁷⁷⁷ that justice must not only be done, it must be seen to be done. It is suggested that, as time passes and the concept of a fair trial undergoes "a considerable evolution in the Court's case-law"⁷⁷⁸ the European Court feels in a stronger position to review member states' actions, and if need be, by transplanting standards.

⁷⁷⁵H. F. M. Crombag, "On the Europeanisation of Criminal Procedure" in: Bruno de Witte and Caroline Forder (eds.), The common law of Europe and the future of legal education, (1992), 399.

⁷⁷⁶Kurt H Nadelmann, op. cit. 509.

⁷⁷⁷P. S. Atiyah, Law and Modern Society, (1983), 43.

⁷⁷⁸(1993) 15 EHRR 92, para. 26.

4.3. Austrian *croquis*

Among the considerably varied approaches to criminal procedure of the member states, there is another angle of the figure of the Prosecutor in a civil law country that runs into the ECHR Europe-wide notion of a fair trial: the submission of a proposal ("*croquis*") of the decision that in the Prosecutor's view the court should adopt. As was the case in Belgium with the withdrawal of the *Ministère Public* to deliberate with the judges behind closed doors, the submission of an outline of the decision made the position of the Prosecutor quite ambiguous in Austrian law. It put a question mark on the due process of law, as far as the appearances were concerned, because on the one hand, the Prosecutor was the criminal defendant's opponent but on the other, he was being invited to participate in reaching a decision, which should be the reserve of the judges.

In *Brandstetter v. Austria*, then, the difficulty for the European Court involved more than a mere disagreement on the interpretation of legal rules. The question arose out of the different tenets of a member state legal system and those of the ECHR. The case involved three applications concerning Article 6 ECHR. Mr. Brandstetter was convicted of adulterating wine, of tampering with evidence and of libelling a witness in the course of judicial proceedings. The European Court treated each suit individually and found no breaches of the ECHR except as regards the handling of the defamation charge before the Austrian court. The applicant claimed that he had not had an opportunity to comment on the written observations submitted by the Prosecutor to the court ("*croquis*"). The government argued that the submissions had been filed according to a standing practice which

must have been known to the applicant's lawyer who, accordingly, could have asked whether a *croquis* had been filed in the applicant's case. If so, he could have requested leave to inspect the file under section 82 of the Code of Criminal Procedure and thus could have made comments on it.⁷⁷⁹ According to the European Court, Section 82 of the Austrian Code of Criminal Procedure did not "seem to grant an unconditional right to inspect the complete file but only the possibility to ask for leave to do so"⁷⁸⁰ and consequently, it apparently sanctioned an inequality between the parties. The European Court also pointed out that the parties to the case differed as to whether the "leave would have been granted at the relevant time." In addition, as regards this defamation charge, the domestic judgment was almost a verbatim copy of the (unchallenged) Prosecutor's submissions to the court.

The key point of conflict between the traditions was the notion of "fairness". The Austrian procedure was on a collision course with the notion of a fair trial born of the common law which was subscribed by the European Court. There had been no evenness between the parties before the domestic judge, since the defence should have had a right to be informed of the submissions so that both could have had the same opportunity to make comments on each other's observations and evidence. The Austrian practice exposed itself as an example of fairness resorted to only as a limit on the means of investigation⁷⁸¹ and as such, it could not satisfy the Convention-based requirements. The European Court said that it was "indirect and purely hypothetical"⁷⁸² that the appellants could have been aware of the filing of the

⁷⁷⁹(1993) 15 EHRR 378, para. 64.

⁷⁸⁰(1993) 15 EHRR 378, para. 64.

⁷⁸¹Trechsel, Stefan, id. 91.

⁷⁸²(1993) 15 EHRR 378, para. 68.

submissions and on that account, it found a breach of the ECHR. In the Court's view, the possibility of making comments on the arguments of the Prosecution by filing an appeal to the Supreme Court did not make up for the right to examine and reply directly, in truly adversarial fashion, as soon as those submissions were made. As in the judgment in *Borgers*, the European Court's yardstick followed a common law guiding principle which required further openness of the courts, a stronger right to be heard, and a more apparent impartiality of the bench than the provisions in Austrian law and practice had made possible.

4.4. Pre-trial detention

As already discussed, the keynote of the clash between the traditions often lies in the contrast between some institutions and the requirements of the ECHR. The application of the ECHR generates "sideways" transplants between the legal systems as many institutions are being checked for compliance by resorting to standards and values more in line with other legal traditions. It is misleading to conclude hastily, however, that it is only the civilian institutions that face such dilemmas. Other differences between the legal systems have repercussions on the attempts at implementing the Convention in a uniform way throughout Europe: there are also fault-lines between the common law and the requirements of the ECHR. *Brogan* is an example. It concerned, among other things, the period of detention in the United Kingdom under emergency legislation before a suspect was brought before a court. The relevance of affording protection to a person's rights lies in the highest risks of being interrogated by unlawful means in this particular period

of detention.⁷⁸³ The issue that interest us was whether the legal system of the respondent government was capable of accommodating an element of judicial control over detentions made under Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 (hereafter, the PTA).

It is convenient at this point to mention the length of the detention concerning the four applicants: McFadden, Tracey, Brogan and Coyle were released after 4 days and 6 hours, 4 days and 11 hours, 5 days and 11 hours and 6 days and 16¹/₂ hours respectively without having been brought before a judge or indeed charged with any offences. In England or Scotland, periods spent by persons in normal pre-trial procedures (not under anti-terrorism laws) will probably not breach the ECHR because they are much shorter than detention on remand in civil law systems, where pre-trial procedures are more inquisitorial.⁷⁸⁴ A long detention on remand may breach Article 5 (3) ECHR but very harsh sentencing will not. In *Brogan*, Strasbourg did not consider just the length of the detention but linked the issue to whether there was judicial control and therefore, found that the period of detention in all four cases had breached Article 5 (3) ECHR. Generally speaking, detentions on remand on the Continent are subject to judicial supervision in the hands of an investigative judge.

The European Court tried to make clear in the judgment that it was aware of the particular demands of the fight against terrorism in Northern Ireland. Article 5 ECHR does not contain qualifying clauses protective of the

⁷⁸³ Françoise Hampson, "The United Kingdom before the European Court of Human Rights", (1989) 9 YEL 121, 155.

⁷⁸⁴ T. C. Daintith and A. B. Wilkinson, "Bail and the Convention: British Reflections on the Wemhoff and Neumeister Cases", (1970) 18 AJCL 237, 237.

reason of state as those included in other articles⁷⁸⁵ which concern the need to give a wider margin of appreciation to the respondent government when the interference complained of can be justified in a democratic society. In spite of this, the European Court tried to bring some flexibility into the adjudication process through the doctrine of the margin of appreciation:

The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 (3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.⁷⁸⁶

The key issue of difference between the legal reasoning of the Court and the system of the respondent government was that none of the safeguards available in domestic law were judicial. Under the PTA, police requests for an extension of detention were referred to the Secretary of State and scrutinised by a Minister. Legislative control was provided by Parliament, who monitored the need for the continuation of the special powers under the PTA. In addition, the operation of the system was reviewed periodically by independent personalities.⁷⁸⁷ The system as it stood might have been capable of controlling, for example, the observance by the authorities of the formalities of an arrest, but there was no control over the substantive reasons of the suspicion against the accused. The Court's majority and the Commission's minority required judicial scrutiny of the powers given by the PTA all the time.⁷⁸⁸ It is possible to speculate

⁷⁸⁵For example, Articles 8, 9, 10, 11 ECHR and 1 of Protocol 1, 2 of Protocol 4 and 1 of Protocol 7.

⁷⁸⁶(1989) 11 EHRR 117, para. 61.

⁷⁸⁷(1989) 11 EHRR 117, para. 61.

⁷⁸⁸Stephen Livingstone, "A week is a Long Time in Detention: Brogan and Others v United Kingdom", (1989) 40 NILQ 288, 295.

that Strasbourg had in mind a civilian model of how to carry out the substantive control at this point. Although the judgment did not say so, the judicial control requirements of the European Court might have been easier to set up in a civil law environment where the investigative judge carries out the investigation and protects the suspects' rights at the same time. This is not so in the United Kingdom, where these functions are divided between the police and the defence lawyers. The government made this distinction appear as a notion so fundamental and ingrained in the legal system that it could not be changed. Following the civilian idea, Strasbourg found that the respondent government failed to comply with those requirements so it overstepped its margin of appreciation:

Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 (3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, 'one of the fundamental principles of a democratic society . . . , which is expressly referred to in the Preamble to the Convention' and 'from which the whole Convention draws its inspiration'.⁷⁸⁹

To understand the assumptions behind the idea of control suggested by the European Court a brief background reference to some differences in the organisation of the police forces may be helpful. There is a split of the traditions over the different models of organisation and functions and in each country this touches upon beliefs on how to conduct (criminal) proceedings and also deep-seated notions of what is good administration. For example, in France,⁷⁹⁰ the same police forces are called differently according to the two distinct functions they perform: the *police administrative* and the *police*

⁷⁸⁹(1989) 11 EHRR 117, para. 58.

⁷⁹⁰L. H. Levinson, "Enforcement of Administrative Decisions in the United States and in France", (1974) 23 Emory L. J. 11, 14.

judiciaire. The administrative functions involve preventive or remedial measures while the judicial functions are those concerning the investigation, apprehension and prosecution of suspects. Judicial control is provided by the judicial (and not the administrative) system of courts, which has jurisdiction over the performance of the judicial duties of the police, although the police forces, as an organ, are considered to be an administrative body.

Such division of functions is unknown in Scotland. The police make no prosecuting decisions and report cases to the procurator-fiscal, who may refer a case to the Crown Office for the decision of an Advocate-Depute or a Law Officer. Prosecution policies are set down by the Lord Advocate and are binding on all procurators-fiscal. The Lord Advocate is responsible for almost all criminal proceedings, assisted by the Solicitor-General for Scotland and a number of Advocates-Depute (practising advocates retained to act for the Crown). There is no such thing as an investigative judge to carry out the duty of control. Although in law a private citizen with a personal and special interest in the case may prosecute, private prosecutions are infrequent. In such case, permission must be sought first from the High Court of Justiciary.⁷⁹¹

In England and Wales, another system with no investigative magistrates, in principle citizens may prosecute unless this has been excluded by statute. In practice, however, criminal prosecutions are brought by the police, government departments (e.g. revenue departments for tax offences) or local authorities. Certain prosecutions need the consent of the Attorney-General (e.g. some offences under the Official Secrets

⁷⁹¹E. C. S. Wade and A. W. Bradley, Constitutional and Administrative Law, (1993), 404.

Act). The Director of Public Prosecutions (DPP), who controls the Crown Prosecution Service (CPS), is appointed by the Attorney-General to work under his general supervision. The DPP appoints a Chief Crown Prosecutor to supervise the CPS in geographical areas and the Crown Prosecutors, barristers or solicitors to conduct proceedings. The CPS conducts all proceedings instituted by the police, makes the decision to institute proceedings in difficult or important cases and advises the police on issues related to criminal offences. Although the DPP can take over the prosecution started by someone else, he/she cannot stop it. Occasionally, a case can be taken over, no evidence offered and therefore an acquittal will automatically follow. The Attorney-General can (rarely) stop prosecutions by issuing a *nolle prosequi*. Abuse of the power would be subject to criticism in Parliament but may not be reviewed by the courts.⁷⁹²

Let us consider now the arguments of the respondent government on the issue of judicial supervision of detention under the PTA. Once arrested, the accused could be detained for up to 48 hours and then for up to a further 5 days with the consent of the Home Secretary. There was no absolute right to legal advice until after 48 hours and in addition, the right to have someone informed of the arrest could be delayed beyond this period.

The arguments of the respondent government carried with them values that the European Court did not share. If judges had to authorise the extension of detention beyond 48 hours, this argument went, the court would have to sit behind closed doors and neither the detained person nor his lawyer could be present or informed of the details,

⁷⁹²E. C. S. Wade and A. W. Bradley, *op. cit.*, 402.

"This would require a fundamental and undesirable change in the law and procedure of the United Kingdom under which an individual who is deprived of his liberty is entitled to be represented by his legal advisers at any proceedings before a court relating to his detention"⁷⁹³. It would be an over-simplification to see the case as an exclusive discussion of a "common law" versus a "civil law" treatment of a point in law. The government was not prepared to disclose the reasons for the detention to the accused and counsel for fear, among other reasons, that this might interfere with the investigation and prosecution of acts of terrorism. Nonetheless, the unwillingness of the British government to entrust a judicial authority with the two functions of inquiring into the matter of the detention and protecting the rights of the accused show also the (common law) assumptions guiding the government's reasoning and the fact that a continental style of control was an "alien" solution. In addition, we may also conclude that not all of the assumptions underpinning Article 5 ECHR seem to be common law inspired.

A respondent government might be inclined to derogate rather than to put an end to expedient executive practices, especially in cases of terrorism. Clearly policy choices were operative in the legal reasoning of the respondent government and the Court had to cope with the effects of the defence of reason of state.⁷⁹⁴ At this point, Judge Martens disagreed with his Strasbourg brethren when he argued, perhaps from a position closer to a "*raison d'état*" approach, "that the Court should respect the United Kingdom Government's choice and cannot but hold that they did not overstep their margin of

⁷⁹³(1989) 11 EHRR 117, para. 56.

⁷⁹⁴Mireille Delmas-Marty, The European Convention for the Protection of Human Rights. International Protection versus National Restrictions, (1992), 2.

appreciation".⁷⁹⁵ From our perspective of the tensions between the legal traditions, two notions of criminal procedure with all their different assumptions clashed over the handling of the pre-trial proceedings. The tension was not resolved as no harmonisation was feasible, and eventually, the respondent government entered a notice of derogation.⁷⁹⁶

In general, reasonable periods vary considerably across the divide between the legal families. A detention will become unlawful as soon as the reasonable suspicion ceases to exist. The European Court approaches the issue of reasonableness on a case by case basis, an attitude strongly resisted by Judge Zekia in *Wemhoff* and *Neumeister*. That judge disagreed with the use of substantially different standards and said so in his dissent in *Wemhoff*:

The Convention has aimed at setting a common standard as to the right to liberty and safety of persons or for the people living in the territories of the member states of the Council of Europe. The difference of standards therefore in such countries cannot be substantially a great one.⁷⁹⁷

The other case worth considering as an example of the tension between the legal traditions is *Toth v. Austria*. Mr. Toth was arrested on January 11, 1985, and although he was examined by an investigating judge less than twelve hours later, his detention on remand lasted for two years, one month and two days before a trial court eventually convicted him. First of all, this case should be seen as an illustration of the extensive powers of detention of the investigative judge in a civilian jurisdiction, which are in sharp contrast with the

⁷⁹⁵Fried van Hoof, "The Future of the European Convention on Human Rights. Judge Martens' position on questions of construction: a dissenting opinion", (1989) 4 *Netherlands Quarterly of Human Rights* 451.

⁷⁹⁶Françoise Hampson, *op. cit.*, 152.

⁷⁹⁷(1979-1980) 1 EHRR 55, dissenting opinion of Judge Zekia, para. [18].

(normal) powers of the police in charge of an investigation in the United Kingdom. The comparative problem for the European Court was to apply the same standards on the length of pre-trial detention under such diverse legal orders. It is hardly surprising that assimilation between the legal traditions could not be achieved. Once again, the ideal of unity made manifest in the creation of a *jurisprudence* which, to all intents and purposes, could be shared by all of Europe, did not appear as a workable solution vis-a-vis the differences between the member states.

Mr. Toth complained that he had been denied a trial within a reasonable time or release pending trial, but the European Court found that the risk of repetition of the offences and the danger of absconding justified the refusal of release. The length of the proceedings, however, could not be justified under the ECHR as they could not be attributed either to the complexity of the case or to the conduct of the applicant because his appeals had not slowed down too much the examination of the case.

The comparative problem for the European Court derived from an oddity of the Austrian legal system which had taken the civilian practice of keeping a "file" full of written documents to the extreme of insisting on the use of originals (and no copies) at all times. The delay, therefore, was caused by shuttling this original file around the prosecutor and judicial offices. The investigation⁷⁹⁸ suffered considerably from such a burden on occasion of each application for release or appeal filed by Mr. Toth, or even requests from the investigating judge or the prosecutor for an extension of the detention. The European Court observed that the

⁷⁹⁸Wilson Finnie, *op. cit.*, 307.

rather odd practice produced "numerous interruptions because the offices concerned relinquished the file, sometimes for quite long periods, to their colleagues"⁷⁹⁹ and introducing the "European consensus" on the issue, the Court could press the idea of uniform standards as it pointed out that "...Preferred to the use of copies, which is the practice in other member states of the Council of Europe, such toing and froing of the file occurred both before the indictment and after it."

The point was that the over-zealous Austrian practice had affected the applicant's position in the trial. In taking this point of view, the European Court followed the common law ideal of adversarial proceedings. The "equality of arms" had not been respected as a result of those delays and Article 5 (4) ECHR had been violated. The Court ruled unanimously on this matter:

In fact Mr. Toth did not have the opportunity to challenge the reasons invoked to justify the continuation of his detention. Any questions by the Court of Appeal would have enabled the representative of the prosecuting authority to put forward his views; they could have prompted, on the part of the accused, reactions warranting consideration by the members of the court before they reached their decision. As the proceedings did not ensure equal treatment, they were not truly adversarial⁸⁰⁰

As in *Borgers* the European Court's benchmark, based on the ECHR, encompassed the common law ideal of adversarial proceedings which requires further openness of the courts, a more widespread right to a hearing, not to mention a strong commitment to making clearly visible the lack of bias of the bench.

⁷⁹⁹(1991) 14 EHRR 551, para. 77.

⁸⁰⁰(1991) 14 EHRR 551, para. 84.

4.5. Dutch Crown appeal

There are other institutions particular to a civilian country, or to the continental tradition in general, that cannot measure up to the common law inspired model of a fair trial enshrined in the Convention. Take the Dutch "Crown appeal"⁸⁰¹ as an example. The Council of State worked under the fiction (similar to the advisory function of its French counterpart before the Law of May 24, 1872, was passed⁸⁰²) that it was merely advising the head of state. The Council lacked the proper jurisdiction of a court to pass judgment against the administration. "Crown appeals" were heard by the Administrative Litigation Division of the Council of State, whose advice was almost always followed, but decided by the Crown itself (*de facto*, a minister). This was the crucial shortcoming that prevented the institution from meeting the requirements of the ECHR. This was also the comparative issue for the European Court to resolve, as the institution appeared to allow the executive to act as a judge in its own cause. In reaching a decision the Court adopted an approach similar to the common law ideal of openness.

Let us consider two cases. *Benthem* concerned an appeal to the Crown against the grant of a licence for the the supply of liquid petroleum gas (LPG) to motor vehicles in a filling station. This was initially granted by the municipal authorities but was revoked by the Crown after a hearing before the Council of State in light of stricter safety standards. As a result, the applicant

⁸⁰¹Some central government departments used the Crown Appeal procedure very often in areas such as environmental law to make local authorities follow the numerous guide-lines and directives that kept coming out of the Department of Housing, Planning and the Environment. Nico Verheij, "Dutch Administrative Law after Benthem's Case", [1990] PL 23, 24.

⁸⁰²L. Neville Brown and J. F. Garner, French Administrative Law, (1983), 29.

was required to cease operating his installation and went bankrupt.

In Strasbourg, however, the advisory function of the Council of State was found in breach of Article 6 (1) ECHR: "a power of decision is inherent in the very notion of "tribunal" within the meaning of the Convention." Although the advice of the Council was "followed in the great majority of cases" it was precisely its nature as "only a practice of no binding force, from which the Crown can depart at any moment" which made it fall short of the Convention's standards.⁸⁰³ The yardstick resorted to encompassed the common law ideal of adversarial proceedings which requires openness, independence and impartiality of the judge.⁸⁰⁴

Moreover, to highlight the common law principle of the "importance of the appearances" the Court went on criticising the ambiguity involved which compromised the requirements of independence and impartiality necessary in a fair trial, as follows:

... the Royal Decree by which the Crown, as head of the executive, rendered its decision constituted, from the formal point of view, and administrative act and it emanated from a Minister who was responsible to Parliament therefor. Moreover, the Minister was the hierarchical superior of the Regional Health Inspector, who had lodged the appeal, and of the Ministry's Director General, who had submitted the technical report to the Division⁸⁰⁵

To give effect to this judgment, an interim Act on Crown Appeals was passed.⁸⁰⁶ After its expiration date, an administrative division empowered to decide any administrative appeal (instead of operating on the

⁸⁰³(1986) 8 EHRR 1, para. 40.

⁸⁰⁴(1986) 8 EHRR 1, para. 43.

⁸⁰⁵(1986) 8 EHRR 1, para. 43.

⁸⁰⁶The Act was passed on June 18, 1987, and came into force on January 1, 1988, with an expiration date set for five years later.

fiction of giving advice) would be created within the Council of State, and similar chambers would be introduced in regional courts.

After this judgment, the courts in the ordinary hierarchy could review the lawfulness of an administrative decision where an administrative appeal to a higher authority was not considered to offer enough guarantees of a fair procedure. The civil jurisdiction was excluded whenever there was an administrative way of attaining a remedy and a fair procedure.⁸⁰⁷

Finally, the "Crown Appeal" procedure was in dispute again in *Oerlemans*. Mr. Oerlemans challenged the designation of his land as a protected natural site before the Council of State in November 1988, on grounds that the designation would turn areas for pasturing cattle into a wasteland. Among the reasons for the dismissal of the appeal, the Crown said that Mr. Oerlemans' use of the land for pasturing could be continued without authorisation, in which case the worries the applicant had expressed were unfounded. The European Court did not find a violation of the ECHR because the national courts had already responded to the Strasbourg judgment in *Bentham* with a "getaway" clause which allowed recourse to the civil system of courts, and Mr. Oerlemans could have made use of it.⁸⁰⁸

Conclusions

Supranational supervision may help to bring about further openness to the legal systems on both sides of the divide between the traditions as the law of the ECHR, interpreted under the common law inspired principle of a

⁸⁰⁷(42/1990/233/299), para. 31.

⁸⁰⁸(42/1990/233/299), para. 57.

fair trial, can be more generous to the applicant than the solutions offered in national law. The "civilian" underpinnings of, for example, the *Ministère Public*, the Austrian *croquis* and the Dutch *Crown Appeal* procedure, were at loggerheads with Article 6 ECHR. These cases do not necessarily mean that civilian countries, for example, lack "open" proceedings as a matter of course. The mix that may result, for example, from the Court's operation and its insistence on the respect for the basic tenets of a fair trial may bring further openness to the proceedings in general. Similarly, T. Koopmans⁸⁰⁹ explained that a significant penetration of common law in procedural matters in EU law has been taking place in the past decade, especially with regard to the insistence on the adversarial character of the proceedings.

No legal system is absolutely "pure." As is the case with other courts, particularly in mixed or "bicultural" jurisdictions,⁸¹⁰ attempts at transplanting notions from one legal culture to another in the process of decision making may be resisted by all those who, for whichever reason, aim at keeping the (unreachable) "purity" of a legal tradition or allowing the member states to act independently:

... attempts to impose a particular model, alien to the legal culture of a Member State, are likely to meet with minimalist adaptations of the existing law to the alien imposition. This is not only a likely response by the legal community guarding its professional interests. It is also a functionally correct response in the interest of preserving the integrity of the existing system and shielding it from the insertion of dysfunctional elements. Reading article 6 of the European Convention on human rights as prescribing a particular model of

⁸⁰⁹T. Koopmans, "The Birth of European Law at the Crossroads of Legal Traditions", (1991) *AJCL* 493, 503.

⁸¹⁰Such as for example, the concern over the inadequacy of the Canadian Supreme Court as a court of last resort for appeals dealing with the civil law of Quebec. See, for example: Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (*Documents of the Royal Commission on Bilingualism and Biculturalism*), (1969), 215.

(criminal) procedure not actually practised in one of the signatory states spells problems for the implementation of the rulings of the European Court. Unless there are redeeming advantages in switching to a different procedural approach, a Member State should not be expected to accept the imposition of elements of an alien legal culture into its own. Rather, the procedural guarantees should be functionally interpreted in terms of strengthening the functionally equivalent elements in the different legal cultures.⁸¹¹

Evidence suggests that it is too soon to see a European "*ius commune*" in the field of human rights; the law is still "uneven" because national diversity is considerable. There are two poles of attraction: one which propounds the creation of one single system of protection; while the other suggests the handling of human rights by completely separate and "water-tight" national systems. Both extremes are unlikely possibilities as such but, as "ideal types", they provide a theoretical framework for understanding the "oscillation" of the European Court's case law. The heart of the interpretation of the ECHR and therefore, of an important aspect of the protection of human rights in Europe, lies in the interplay between unity and diversity. An observation made concerning the "mind-broadening" effect of a "European Law school" in principle capable of encouraging a two-way traffic between systems and traditions may well apply to the Strasbourg decision making process in this respect:

... I find a European Law School highly desirable, because of its mind-broadening effects on students and teachers. This mind broadening effect is very important to let the process of European unification be as flexible and diversified as possible, a process in which the different legal traditions should stay

⁸¹¹Jürgen Backhaus, "Integration, Harmonisation and Differentiation of Law within the European Context from an Economic Point of View", in: Bruno de Witte and Caroline Forder (eds.), *op. cit.*, 527.

clearly recognisable and should stimulate each other's creativity.⁸¹²

Convention law rather than a monolithic system is, thus, a dynamic framework for diversity: the differences between the legal families and systems interact in all areas. The efforts of the Court to treat the countries equally and to "transplant" basic ideas and principles from one tradition into another may make the legal systems come closer but not erase the disparities.

⁸¹²Nikolas H. M. Roos, "Dinosaur-Complex versus Legal Pluralism", in: Bruno de Witte and Caroline Forder (eds.), *op. cit.*, 659.

Decision-making and interpretation in Strasbourg

Comparative law analysis of
the case law of the
European Court of
Human Rights.

(4th. part)

-final-

On a not too remote visit to Australia, where I attended a congress which brought together Jurists representing all countries of the British Commonwealth, I was asked continually how the Supreme Court of Canada could succeed in having to hear and decide appeals now under the Common Law and then under the Civil Law [...] I kept on trying to convince them that this offered no handicap. In such a task I was helped by the Chief Justice of South Africa, where a similar situation occurs, except that there the French language is replaced by the Dutch language [sic.], and the French Civil law by the Roman Dutch law.⁸¹³

Introduction

This chapter is a continuation of the analysis undertaken in the previous two and is the final of the set of four concerned with the judgments of the Court seen in comparative perspective. The examples that will be discussed here deal with the problematic divide between

⁸¹³The Right Honourable Thibault Rinfret, "Reminiscences from the Supreme Court of Canada", (1956) 3 McGill L. J. 1, 1.

public and private law, a traditional civil law classification whose presence in Strasbourg is still noticeable.

5. The classification and rules of what is public and private law

One traditional difference between the civil law and the common law is the weight given to the dichotomy "public" versus "private" law, so important in a civilian jurisdiction that it may be considered its main systematising division.⁸¹⁴ Civilian legal theorists make this dualism rest on a quotation from Ulpian in the *Digest*:⁸¹⁵ "*Publicum jus est, quod ad statum rei Romanae spectat; privatum, quod ad singulorum utilitatem*", which means - in their systems as heirs to the Roman law tradition - that the rules of public law concern the state while those of private law concern private persons:

For the civil law jurist the fundamental division is that between private and public law. The dividing lines may be unclear, the logical bases disputed, but the traditional dualism recognized in Roman law remains the most significant division in a civil law system.⁸¹⁶

The feature has been carried forward through the centuries on the European continent, and its echoes are still perceptible in some decisions of the European Court. For example, it has been argued on admissibility issues, particularly when civilian countries as respondent governments seek dismissals of cases which fall within the category of "public" law which is apparently left out of the protection of the ECHR.

⁸¹⁴R. David and H. de Vries The French Legal System. An Introduction to the Civil Law System, (1958), 45

⁸¹⁵*Digest*.I.2.11.

⁸¹⁶Henry P. de Vries, Civil Law and the Anglo-American Lawyer. A case-illustrated introduction to civil law institutions and method, (1976), 69.

In fact, there is a polarisation between common law and civilian countries over the use of this defence. The general experience of the United Kingdom government before the Court suggests the lesser importance (or perhaps irrelevance) of the classification in a common law system as British lawyers seem not to argue this distinction in situations in which their continental counterparts are liable to claim it. This circumstance shows that there are no anxieties in the common law world over whether a proceeding to enforce or set aside an administrative decision is "civil" or "public" because for common lawyers any such litigation is to be brought in an ordinary court under the procedural rules applied in civil actions. To illustrate, in *Golder v. United Kingdom*⁸¹⁷ the Court said that "One point has not been put in issue and the Court takes it for granted: the 'right' which Golder wished, rightly or wrongly to invoke against Laird before an English court was a 'civil right' within the meaning of Article 6 (1)". The case concerned an inmate who sued a prison officer, which would have been a "public" law question to be brought in the administrative courts in a civilian country. Likewise, in *Campbell and Fell v. the United Kingdom*⁸¹⁸ the subject-matter concerned disciplinary proceedings in prison, and the applicants complained that there had been delays in granting them permission to seek legal advice to sue for assaults committed by prison officers acting within the course of their duties. The "civil" nature of this action was not put in issue by the respondent government, probably because the distinction "private" and "public" law does not carry the connotations attached to it on the continent: "When English lawyers think of public law, it

⁸¹⁷(1979-80) 1 EHRR 524, para. 27.

⁸¹⁸(1985) 7 EHRR 165, para. 105-7.

is thought of primarily in terms of the application for judicial review."⁸¹⁹

Such an ingrained civilian dichotomy was bound to emerge in the reasoning of the European Court. For one thing, civil law trained judges make up the majority of the bench. For another, Article 6 ECHR and its clause "determination of civil rights and obligations" provided a backdrop to the problem. The European Court was faced with the issue of establishing uniform criteria to have jurisdiction to protect the due process equally in relation to (some) decisions and actions of administrative authorities and agencies of the common law and civilian member states. Arguably the European Court would have not been able to hear the continental equivalents of *Golder* or *Campbell and Fell* because of the seeming "public" nature of the rights in dispute. The Court, however, did not cast the distinction entirely aside. Rather than playing down the relevance of drawing a substantive law line between "public" and "private" law the European Court to some extent avoided the issue by determining that the meaning of Article 6 ECHR was "autonomous".⁸²⁰ Strasbourg does not understand the meaning of the expression "civil rights and obligations" in terms of the domestic law of the member state in which it comes in issue. Whether the underlying dispute is one between individuals or one between an individual and a public authority is not decisive, even if the latter is involved in a sovereign capacity nor is it decisive whether the proceedings take place before a civil court or any other body with jurisdiction. The "determination", on the other hand, need not be the main point of the proceedings and for this reason this comparative point tends to appear as a "threshold

⁸¹⁹Peter de Cruz, A Modern Approach to Comparative Law, (1993), 93.

⁸²⁰J. E. S. Fawcett, The Application of the European Convention on Human Rights (1969), 125.

issue"⁸²¹ regarding whether the Court has jurisdiction to hear a case.

In the German case *König*, the applicant, Mr. König, was a medical practitioner whose licence to practise medicine and run a clinic was withdrawn by the administrative authorities. He filed the appropriate action with the competent bodies with the result that, at the moment of filing a complaint in Strasbourg, the proceedings with respect to running the clinic had extended for nearly 11 years without a final determination and those concerning the right to practise had already taken seven. Without waiting for the completion of the domestic litigation Mr. König claimed in Strasbourg that the delays infringed his rights under Article 6 (1) ECHR and, therefore, he sought a declaratory judgment and damages. The European Court ruled that the German courts took too long to decide. The important point for us, however, was how the Strasbourg Court removed the obstacle that otherwise would have blocked any European determination on this case: the question of whether Article 6 ECHR covered the administrative proceedings of the kind involved in this case which were "public" under German domestic law.

The point of divergence between the Court's method and a purely civilian treatment of the issue lay in the exclusion of the Court's jurisdiction that would have resulted from following a traditional civil law approach. It goes without saying that the civilian method suited the respondent government's position, who deployed a very strong argument, from a civilian point of view, submitting - perhaps also seeking the understanding of their fellow civilian lawyers in the Court - that:

... Article 6 (1) covers private-law disputes in the traditional sense, that is, disputes between

⁸²¹Wilson Finnie, "Jurisprudence of the European Court of Human Rights 1991" 1992 *Juridical Review* 287.

individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law; among other things, disputes between an individual and the State acting in its sovereign capacity would be excluded from the ambit of that Article.⁸²²

The Court was not, however, impressed by that argument of the German government lawyers - which was almost a paraphrase of the "private" and "public" law distinction in *the Digest* - and interpreted the terms of Article 6 (1) ECHR as "autonomous" and not dependent on German law.⁸²³ The Strasbourg Court said that:

... Whilst the Court thus concludes that the concept of 'civil rights and obligations' is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance. Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right -and not its legal classification- under the domestic law of the State concerned ...⁸²⁴

Nonetheless, by making a reference to the relevance of the "substantive content and effects of the right" the judgment revealed that the Court was not, however, prepared to set entirely aside the traditional civilian distinction in order to, for example, follow an approach similar to that of the common law. The Court appeared to reappraise the right at issue but maintaining legal reasoning within the straitjacket of the classic civilian dichotomy. Its technique, although in the end put the applicant in a better position, consisted in finding a "civil" right behind what "appeared" to be "public": the legal relationship between a doctor with his or her patients was "private" because it was contractually

⁸²²(1978) 2 EHRR 170 para. 90.

⁸²³J. G. Merrills, The development of international law by the European Court of Human Rights, (1988), 66.

⁸²⁴(1978) 2 EHRR 170 para. 89.

based. Whether the underlying dispute was one between individuals and a public authority and whether the proceedings had taken place before a body with jurisdiction other than a civil court were not decisive. Therefore, decisions to continue to exercise the right to run a private clinic and practise medicine were decisions about civil rights while decisions to grant the right to practise medicine and run a private clinic were not: "If the case concerns a dispute between an individual and a public authority, whether the latter had acted as a private person or in its sovereign capacity is therefore not conclusive"⁸²⁵.

Judge Matscher's disagreement with the classification of the right as "civil"⁸²⁶ indirectly showed that the Court did not part ways with such civilian framework of reasoning. The Austrian judge resorted to the "European consensus" of the greater part of the (civil law) member states to dispute the result arrived at by the majority in the use made of the distinction "civil" versus "public" law. Unlike the majority's position, in his opinion the right at issue was "public":

... when [the Court] states that the professional position of the doctor is to be classified as a civil right within the meaning of Article 6 (1) of the Convention, the Court is creating a notion of 'civil right' which is not only 'autonomous' within the meaning of the Convention but which finds no basis in the legal systems of the vast majority of the contracting States ...⁸²⁷

This (civilian) consensus would have worked in the government's favour. In the instant case, it would have

⁸²⁵In the *Ringeisen Case* (No. 1) the Court said that "The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, et.) and that or the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence. (1979-80) 1 EHRR 455, para. 94.

⁸²⁶Mr. Franz Matscher is the Austrian judge.

⁸²⁷(1978) 2 EHRR 170, Judge Matscher's dissenting opinion.

determined a refusal of an extension of the protection of Article 6 ECHR.⁸²⁸ Incidentally, it also serves to show that the balancing principles used by the Court sometimes work - or at least, have a potential to work - in one direction and sometimes in the opposite. It can be speculated also that the appeal of the archetype of a single system of protection capable of assimilating both traditions might have played a role in attributing "autonomy" to the prescriptions of the article.

The pattern was repeated in several other cases, for example, in *X v. France*⁸²⁹. Mr. X was a haemophiliac who contracted AIDS from HIV infected blood. He claimed compensation from the French Minister of Health for the damage allegedly resulting from the government's negligence in failing to introduce adequate safety regulations concerning blood products. As had happened in *König* some years before, the Court rejected the government's civil law based submission that Mr. X's claim fell outside the scope of Article 6 ECHR because it was framed only on the basis of the French government's liability for negligence in the exercise of its regulatory function, which in France would not be classified as a matter concerning "civil rights and obligations". France followed the usual attempt of the civilian member states to seek a dismissal by arguing this distinction from the point of view of their own municipal law and the Court answered reasserting that the notion was "autonomous":

... As the Court has consistently held, the notion of "civil rights and obligations" is not to be interpreted solely by reference to the respondent State's domestic law and Article 6 (1) applies irrespective of the parties' status, be it private or

⁸²⁸Clovis C. Morrisson, Jr. The Dynamics of Development in the European Human Rights Convention System, 18.

⁸²⁹ (81/1991/333/406). See case note by David Geer, "Right to a hearing within reasonable time", *Legal Action*, June 1992, 22.

public, and of the nature of the legislation which governs the manner in which the dispute is to be determined; it is sufficient that the outcome of the proceedings should be decisive for private rights and obligations. That is indeed the case in this instance, in view of the purpose of the action, so that Article 6 (1) is applicable ...⁸³⁰

The European Court then turned to decide whether Mr. X's claim against the Minister of Health had been heard within a reasonable time by the French administrative courts. The ruling was in favour of Mr. X. The character of the domestic legislation which governed how the question was to be determined (civil, commercial, administrative law, and so on) and that of the authority with jurisdiction to hear the matter (for example judicial court or administrative body) were of little consequence.⁸³¹

The Court's case law does not define abstractly, however, what is a "civil right". In *König* and *Le Compte*, the notion of "civil" even if it is equated with "private" can be applied to many proceedings which in form or subject are "public" in the usual civilian approach, although the outcome is of direct interest for the determination and/or content of a private right or a private obligation. The issue is, then, whether "civil" in the ECHR means "private" in the civilian dichotomy. In *Ringeisen*⁸³² the Court apparently answered in the affirmative. In *König*, however, the European Court left the question open: "...the Court concludes that Article 6 (1) is applicable, without it being necessary in the present case to decide whether the concept of 'civil rights and obligations' within the meaning of that provision extends beyond those rights which have a

⁸³⁰(81/1991/333/406), para. 30.

⁸³¹M. A. Eissen, Case-law on Article 6 of the Convention, European Court of Human Rights, 5 and 6.

⁸³²(1979-80) 1 EHRR 455.

private nature."⁸³³ In *Bentham*⁸³⁴ the Court declined the opportunity to give an abstract definition: "The Court does not consider that it has to give on this occasion an abstract definition of the concept of "civil rights and obligations"...⁸³⁵ Do the *travaux préparatoires* help? Professor van Dijk⁸³⁶ explained that the formula "civil rights and obligations" was adopted in French without changes, but in English, a change was introduced at the last moment, and the present expression replaced the wording "rights and obligations in a suit-at-law." Although no reason was given, "suit-at-law" seems not to have been an equivalent to "*de caractère civil*" for the continental lawyers and linguists involved. Judge Matscher, on the other hand, in his dissenting opinion in *König*, pointed out that the study of the antecedents of Article 6 ECHR may not be of benefit for the process of decision-making: "There is an abundance of writing on the pre-history of Article 6. It shows us that one cannot obtain from the legislative history very concrete ideas of the scope of the provision."

Whatever the case, the dichotomy can also appear before the European Court in other guises. For example, it impinges on the organisation of the domestic court system of some (civilian) member states, and as it is the case with other traditions or even idiosyncracies of national law, it can percolate through the adjudication process at Strasbourg. In the civil law world, the distinction "is crucial to the process of allocation of the court which has jurisdiction to hear the case."⁸³⁷ The difference

⁸³³(1979-80) 2 EHRR 170, para. 95.

⁸³⁴The facts of this case were discussed in Chapter 9.

⁸³⁵(1986) 8 EHRR 1, para. 35.

⁸³⁶Pieter van Dijk, "The interpretation of "civil rights and obligations" by the European Court of Human Rights - one more step to take", Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda, F. Matscher and H. Petzold (ed.) , (1988), 131. He also explains that the *travaux préparatoires* of Article 14 of the United Nations Covenant on Human Rights can cast light on the meaning of "civil rights and obligations" of Article 6 (1) ECHR.

⁸³⁷Peter de Cruz, op. cit., 93.

between "civil/private" law and "public" law is substantive as well as procedural; however, the paradox with this opposition is that despite its importance (and its ubiquity) continental lawyers are not all agreed on how to make it. The *jurisprudence* is decisive to distinguish what is "public" from what is "private". If both the judicial and administrative courts claim jurisdiction over a case, the French "positive" approach involves a final decision by the *Tribunal des Conflits* while the German "negative" approach requires sending the case to a court of a different judicial hierarchy upon a motion of the plaintiff and this transfer is binding on the receiving court unless reversed on appeal.⁸³⁸

The distinction between judicial and administrative courts - a direct "organisational" consequence of the use of the dichotomy in Belgian law - was brought to the European forum by the admissibility issue in the case of *De Wilde, Ooms and Versyp (No. 1)*⁸³⁹. The European Court had to turn into a sort of supranational *Tribunal des Conflits* and determine whether the case at hand was "judicial" or "administrative". The result was decisive concerning admissibility. If the Belgian administrative hierarchy of courts had jurisdiction to hear the claim, then the applicants had not exhausted the domestic remedies and Strasbourg was precluded from determining the case. Conversely, if it was the judicial system of courts, then the European path was open to them because no further remedies would have been available in national law. In this case, after the examination of the internal aspects of Belgian law, the European Court was able to say that the domestic remedies had been exhausted and therefore Strasbourg had jurisdiction over the case. It should be remembered that in continental countries the

⁸³⁸Rudolf B. Schlesinger, Hans W. Baade, Mirjan R. Damaska, and Peter Herzog, Comparative Law: Cases - Text - Materials, (1988) 503.

⁸³⁹(1979-80) 1 EHRR 373.

different branches of the law tend to keep an "autonomous" character to the extent that there is no unity of method throughout the legal system as implied in the phrase "common law".⁸⁴⁰ This situation may impinge on the outcome of a case as different results may ensue if it were argued before one or the other branch of courts. Each branch has special procedural requirements, for example, and their *jurisprudence* may be considerably different.

Three vagrants surrendered themselves voluntarily to the Belgian police. A magistrate placed them in detention. They all made several requests to the Minister of Justice for release, but did not contest the detention before the administrative courts or the Council of State because the Belgian *jurisprudence* was thought to preclude any such recourse. Two months after the Commission declared the applications admissible, however, the domestic case law changed.⁸⁴¹ The applicants were eventually released, but the Strasbourg Court ruled against the Belgian government under the prescriptions of Article 5 (4) ECHR. Moreover, the Court concluded that it could reexamine the admissibility of an application under Article 26 ECHR in spite of the examination already carried out by the Commission.⁸⁴² The Court also said that the government

⁸⁴⁰René David and Henry P. de Vries, op. cit., 44.

⁸⁴¹The Belgian Council of State had dealt only once with an appeal for the annulment of detention orders for vagrancy before this case was declared admissible by the European Commission. The other appeal was heard two months after the filing of this application, in which the Council of State annulled a decision by which the police had placed Dubois, the appellant, in detention at the disposal of the Belgian government in pursuance of Section 16 of the 1891 Act. The Council of State considered the decision of the police to be not a finding of a criminal offence but an administrative security measure not open to appeal before the ordinary courts.

⁸⁴²In a dissent in *Broziek v. Italy* (1990) 12 EHRR 371, Judge Martens advocated that the Court rid itself of the Article 26 doctrine developed in the Vagrancy cases. By devoting itself to the issue in this particular case, the Court had to address again a comparative law problem and go into complex domestic law questions that had already been studied by the Commission. In Martens' words in para. 4.4: "(...) questions may arise as to the interpretation of the many subtly connected rules that we conveniently, but with some oversimplification, designate as the exhaustion rule; and, lastly, it may be necessary to go into intricate questions of domestic law and to make difficult factual assessments. Moreover, most of these questions will already have been answered by the other Convention organ,

was not estopped from raising the question of inadmissibility of the application.

The government argued that the applicants could have challenged - administratively - the Minister of Justice's decision, however, the government's agent had acknowledged at the first hearing before the Commission that the Council of State would not have granted leave to appeal. The European Court, based on the domestic case *Vleminckx*,⁸⁴³ said therefore that the applicants had been justified in keeping their actions within the judicial hierarchy of courts. The test carried out was as follows: were the domestic decisions rendered under the Belgian vagrancy Act of 1891⁸⁴⁴ administrative and not judgments (of the judicial hierarchy of courts) and thus, not subject to appeal or cassation proceedings? The Strasbourg Court understood that at the time of the application the actions were not of an administrative nature and therefore the applicants were excused from attempting a remedy before the administrative system of courts. The European Court had jurisdiction and granted protection providing a remedy to protect the rights of the applicants.

which has far more practice and therefore experience in this field than the Court". In his separate opinion in the *Case of B. v. France* (57/1990/248/319) he brought up the issue again: "I would have been even more content if the Court had accepted the Commission's plea to abandon the De Wilde, Ooms and Versyp doctrine (...) I am glad to note that several of my colleagues now share that opinion".

⁸⁴³(1979-80) 1 EHRR 373, para. 37.

⁸⁴⁴Sigmund Cohn, "International Adjudication of Human Rights and the European Court of Human Rights: A Survey of its Procedural and Some of its Substantive Holdings, (1977) 7 Ga.J.Int'l & Comp.L. 315, 377: The Belgian vagrancy Act of 1891 required that suspects of vagrancy be brought before a police court composed of a magistrate, where, after determining the "identity, age, physical and mental state and manner of life" of the person, the magistrate would consider whether the individual was a vagrant. Section 13 laid down that a person could be detained at the disposal of the government in a "vagrancy centre" between 2 and 7 years, but could be released earlier than that if the Minister of Justice considered that there was no reason to continue the detention. Under Section 16 the detention could take place in an "assistance home" for not more than a year. Sigmund Cohn wrote the available system of rehabilitation had almost erased the differences between "vagrancy centres" and "assistance homes." See also: Thomas E. McCarthy, "The International Protection of Human Rights Ritual or Reality? The Vagrancy Cases Before the European Court of Human Rights", (1976) 25 ICLQ 261.

Undoubtedly the legal cultures are split over the power of this dichotomy and its effects within a legal system. It may well serve as an illustration of the fault-lines between the traditions the rhetorical question asked by a continental commentator⁸⁴⁵ who wondered, on the eve of the United Kingdom's accession to the European Community, whether the system of public law available in that country could adapt itself to the new situation. British writers are aware of such civilian perception and put it (tongue-in-cheek) "...we are sometimes said by Europeans to possess no public law."⁸⁴⁶

Can the dichotomy lead to difficulties or misunderstandings when the Court has to deal with applications from a common law jurisdiction? We should consider, for example, the AGOSI case⁸⁴⁷, where the comparative point was the following: did the English (administrative) legal system provide sufficient protection to the right of an innocent *bona fide* owner to repossess his goods seized by customs officers from convicted smugglers? Judge Pettiti, dissenting, said that it did not. AGOSI was a case involving the seizure of 1,500 Krügerrands by British customs which, after judicial proceedings, were declared forfeit. X and Y, from whom the Krügerrands were sequestered, were arrested and convicted of attempting to smuggle the coins into the United Kingdom, where the import of gold coins was illegal. The coins had been sold and delivered by AGOSI to X and Y, but had been paid with a cheque which was later dishonoured. The company laid claim to the coins as an innocent third party after being notified of the seizure by the United Kingdom Customs and Excise. As a consequence of the company's claim the Commissionners

⁸⁴⁵ "Des voix très autorisées soulignent depuis un certain temps, l'insuffisance du droit public au Royaume-Uni", Jean-Victor Louis, "Rapport" (1972) 5 RDH 675, 682.

⁸⁴⁶ Carol Harlow, "Public" and "Private" Law: Definition without distinction", (1980) 43 MLR 1, 1.

⁸⁴⁷ (1986) 9 EHRR 1.

started court proceedings to have the coins forfeited. The High Court declared so on March 10, 1978. On December 10, 1979, the Court of Appeal dismissed AGOSI's petition. Lord Denning said that the procedure to be followed was administrative and to be brought before the Commissioners subsequent to forfeiture⁸⁴⁸ but AGOSI's claim was refused again. The company, however, did not seek judicial review of this rejection.

In Strasbourg, the European Commission found that the forfeiture constituted a breach by the United Kingdom of Article 1 of Protocol 1. Yet the Court held by 6 votes to 1 that there had been no violation of this article and found that Article 6 ECHR did not apply on the determination of a criminal charge nor was it necessary to consider it as regards the issue of "civil rights and obligations".

On the other hand, one may justifiably believe that Judge Pettiti's dissenting position was that of being an "outsider" to the common law system and which gave him some beneficial scepticism for his questions. Whatever the case, no doubt it is the French lawyer in him who is speaking - probably from a position of familiarity with an administrative court system presided over by the Council of State - when he found the English law solution wanting in those terms:

...before the Commission and the Court, we saw how complicated were the English procedural rules on this subject. The English rules cannot be compared with those of the Continental systems which ensure that there is precise judicial review of administrative acts in the course of administrative dispute proceedings.

In taking this position he had in mind a continental conception of administrative law. Such a conception is

⁸⁴⁸Under Section 288 of the Customs and Excise Act 1952.

more comprehensive than the common law position, for it takes in more issues, such as the use of regulatory power, the law of both the civil service and government property, and administrative obligations. In the common law tradition, to address the issue in a nutshell, administrative law is concerned with powers and remedies. It answers questions such as the extent of the administrative powers vested in agencies, their bounds and the remedies available to keep the authorities within their limits.⁸⁴⁹ Perhaps "Drawing their inspiration from French traditions, continental lawyers are apt to give "public law" the highly specific meaning of "a body of wholly autonomous rules, entirely separate from private law""⁸⁵⁰ but probably also, at the time this case was argued, English law was still lagging behind the Continental (or French) position⁸⁵¹ as the usefulness of judicial review in the case may have been open to doubt. Judge Pettiti highlighted a vacuum in English law in a period stretching from 1836 to 1985, when apparently no case had been heard concerning judicial review of the exercise of the discretionary power of Customs and Excise to restore seized property. "It is true that in the United Kingdom the judicial review procedure is developing positively, but it can still be puzzling even to informed British lawyers as is shown by the infrequency of judgments on the subject", he wrote in his dissent.

The key point of difference between the approach taken in the United Kingdom and Judge Pettiti's civilian reasoning was the blurred distinction between a criminal and an administrative sanction in English public law: "If the Customs had taken criminal proceedings against AGOSI's

⁸⁴⁹Bernard Schwartz, Administrative Law, (1976), 2.

⁸⁵⁰Carol Harlow, op. cit., 1.

⁸⁵¹Andrew Drzemczewski and Colin Warbrick, "The European Convention on Human Rights", (1986) 6 YEL 417, 427.

manager for alleged complicity in the crime, he would have benefited from a fair trial". He wrote that the English system did not distinguish between forfeiture and definitive confiscation, and incidentally, he was concerned with the possibility of a different outcome in a different system of public law:

... it seems to me that the procedure followed did not draw a sufficient distinction between criminal law and administrative law, between confiscation in the English sense of "forfeiture" and definitive confiscation, i.e. transferring the property to the benefit of the State, so as to ensure that the exercise of the right of a legitimate owner is not defeated by a criminal or customs offence...

He argued, therefore, that the discretionary powers of restitution of the Commissioners of Customs and Excise were too wide. Perhaps imposing the guidelines of French or continental administrative law, he found English public law below the standards of protection set down in the ECHR. In his view AGOSI was entitled to repossess the coins, and he added that "What we find is an administrative sanction taken by the Customs and not motivated by any guilt of any sort on AGOSI's part".

The issue running through all these cases was, again, whether the European Court could build a *jurisprudence* which can be shared by all the member states vis-a-vis the different public law systems available and the different approaches to the distinction between private and public law. Sometimes the issues could not be assimilated across the divide. On occasion, the European Court was successful in avoiding too much of an imbalance that a different judgments would have produced, particularly on the admissibility distinction. By the creation of an "autonomous" concept, the "civil" notion of Article 6 ECHR expanded the European jurisdiction to a degree. The dichotomy is still present in the European *jurisprudence* but the "autonomous" interpretation has

increased the "transplantability" of the standards of the Court to similar cases irrespective of their jurisdiction of origin.

Conclusions

Although there may be much approximation between the legal traditions, many components of the law and legal culture of the member states still keep their particular distinctiveness: the "transplants" from one legal tradition to the other do not erase it completely. There is no counterpart in Convention law to Article 177 EEC.⁸⁵² The remedies to protect human rights are still primarily determined by national law and the ultimate control the Strasbourg institutions can exercise over the outcomes is a good deal weaker than that of the EU in its area of influence. It would appear, then, that harmonisation is a reality in some areas while in others it still remains an unattained goal notwithstanding the efforts or the good will of the Strasbourg institutions or even the respondent governments.

In many cases the Strasbourg institutions appear to be in a tantalising quest for a single European law of human rights. Diversity interposes itself, however, as the stumbling block which prevents the achievement of the goal. The paradox is that a complete success in establishing a single system would entail a defeat, because heterogeneity is a source of inspiration in Convention law, "unlocked" by the use of the comparative method. It is suggested that a single system, apart from being almost impossible to set up, would lack dynamism and richness.

⁸⁵²John Temple Lang, "The Sphere in which Member States are obliged to comply with the General Principles of Law and Community Fundamental Rights Principles", (1991) LIEI 23, 33.

The evolving European law of human rights has a strength in its variety, and also in the tensions produced by its superimposition on other systems already in place in the member states. As a shared framework it accommodates diversity (with more or less success according to the case) and as such, it is far from anything resembling a single structure. The Strasbourg system does not appear to take over, it rather offers an extra option to the several other systems already in operation in the member states and elsewhere. It is a further safety device, for its operation is triggered by a failure of the domestic systems to protect a right. Underlying the system is the understanding that the member states may, of course, give more protection than that afforded by the Convention system.

With regard to the method used in the analysis, it should be kept in mind that the comparative method does not, however, capture all the aspects involved in the interpretation of the Convention law which have an impact on the outcome of the cases. Elements such as policy considerations, both in Strasbourg and in the member states, the doctrine of the margin of appreciation or the due respect to national characteristics play their important part in the final outcome of a case. Legal interpretation of Convention law is affected, therefore, by those various ingredients, all of them closely interwoven and operating in conjunction. Social and other factors do influence outcomes, but an underlying idea in these four chapters has been that the law moves in its own domain, and thus it is possible to study it in relative isolation from those other elements and in our case, concentrate on legal interpretation. The comparative method has the potential to help in the unending refinement of Convention law by means of the

"transplants" of standards, principles and ideas from one tradition to the other.

Strasbourg as Donor: Human Rights in the European Union

What better introduction to the European ideal than to examine the way in which these [human] rights, extending across the whole gamut of civil and criminal law and across the chasm which divides substantive law from procedure and the administration of justice, come under threat and are brought within the mantle of the protection of justice.⁸⁵³

The transfer by States from their domestic legal system to the Community legal system of rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.⁸⁵⁴

Introduction

Of the many aspects that the relationship between the EU system and the protection of human rights involves, this chapter concentrates on the ECJ's human rights *jurisprudence* - a "mix" of the legal traditions of the member states - in order to see whether cross-cultural rules and case law enhance the ECJ's ability for protecting human rights in a multicultural setting. The purpose is to see how the legal traditions, among other forces, shape the decision-making process.

⁸⁵³Roy Goode, "The European Law School", (1993) 13 Legal Studies 1, 14.

⁸⁵⁴*Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, [1964] CMLR 425.

The chapter is divided in two parts: the first will address the substantive discussion of the existence of human rights principles in the EU legal order, and the second part will carry out the comparative analysis of the relevant *jurisprudence*.⁸⁵⁵

Part I

Substantive aspects

The relevant principles applicable to human rights in the field of EU law have been evolving over a long space of time. They derive from the Treaty of Rome and the case law of the ECJ. At present there is a new situation since Article F (2) of the Treaty on European Union (hereafter Maastricht) guarantees respect for human rights as laid out in the ECHR by giving statutory expression to the idea which had been guiding the ECJ case law. Maastricht sets down that fundamental rights as protected by the ECHR and the constitutional traditions common to the member states are general principles of EU law.

In EU law there were formerly no provisions such as, for example, Article 3 of the Statute of the Council of Europe that required acceptance of the rule of law and human rights as a condition of membership. There was no listing of EU human rights and the situation was not entirely clear:

As long as there is no codification of Community human rights, it will be hard to establish which

⁸⁵⁵The comparative methodology has already been applied to the case law of the European Court of Human Rights in chapters 7 to 10, and the literature relied on for this chapter, included, among others: Liana Fiol Matta, "Civil Law and Common Law in the Legal Method of Puerto Rico", (1992) 40 AJCL 783, Peter H. Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution (Documents of the Royal Commission on Bilingualism and Biculturalism), 1969, and T. B. Smith, Studies Critical and Comparative, (1962).

principles belong to this category. There is no sharp division drawn between basic human rights and other legal principles. Several of the legal principles recognized by the Court of Justice [...] can at the same time be held to be basic human rights.⁸⁵⁶

Although there was no explicit allusion to the ECHR in the EEC Treaty, hundreds of EU provisions, however, touch upon human rights issues. In general, these rights (now as it was then) tend to be based on social and economic grounds. For example, the EU confers rights at the national level related to the activities of the EU such as "the abolition, as between Member States, of obstacles to freedom of movement of persons, services and capital"⁸⁵⁷ or the provisions on freedom of movement and its implementation.⁸⁵⁸ In addition, the principle of non-discrimination does underpin several articles.⁸⁵⁹ Some articles establish the promotion of a better standard of living as a goal of the EU⁸⁶⁰, and others list activities relevant to that end⁸⁶¹ or recognise a right to be compensated for illegal acts of the EU.⁸⁶²

There are other substantive rules of importance.⁸⁶³ The agreements concluded by the member states before entry are preserved and the obligations of the member states under the ECHR are protected.⁸⁶⁴ The logic of the EU system requires that the ECJ be the ultimate arbiter in

⁸⁵⁶H. G. Schermers, Judicial Protection in the European Communities, (1983), 39.

⁸⁵⁷Article 3 (c) EEC.

⁸⁵⁸Articles 48 to 58 EEC.

⁸⁵⁹Such as for example, Articles 7, 48 (2) and 220 EEC which ban discrimination on grounds of nationality, Article 37 (1) EEC which deals with the activities of State monopolies or Article 119 EEC which grants equal pay for both sexes.

⁸⁶⁰Article 2 EEC.

⁸⁶¹Including the creation of a European Social Fund, regulated by Article 123.

⁸⁶²Article 215 EEC.

⁸⁶³See also: A. H. Robertson and J. G. Merrills, Human Rights in Europe: A Study of the European Convention on Human Rights, (1993), 362 and M. Sørensen, "Punti di contatto tra la convenzione europea dei diritti dell'uomo ed il diritto delle comunità europee", (1978) 18 RDE 163.

⁸⁶⁴Article 234 EEC.

matters of EU law.⁸⁶⁵ Furthermore, Article 62 ECHR is relevant in this context: if conflict arises, EU law will prevail where the rights it guarantees are superior to those under the ECHR (e.g. equal pay for both sexes⁸⁶⁶, no discrimination on grounds of nationality).

The ECHR imported into the legal system of the EU

The principles related to human rights protection have been evolving in different ways. The European Parliament (which passes resolutions with no legal effect in the member states⁸⁶⁷) passed a Declaration of Fundamental Rights and Freedoms on April 12, 1989. The EU Commission⁸⁶⁸ had also said that the ECHR "has binding effect on the activities of the Community institutions." This organ had become interested in a Bill of Rights particularly after conflicts with the German and Italian Constitutional Courts over the supremacy of the basic provisions on human rights in their national constitutions.⁸⁶⁹

The EU Commission, the Council of Ministers and the European Parliament, jointly adopted a Common Declaration of Rights in 1977⁸⁷⁰ which emphasised "the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the member states and the [ECHR]." Although not

⁸⁶⁵Article 219 EEC.

⁸⁶⁶On the issue of protection against discrimination on grounds of sexual orientation in the sphere of European law see the discussions in the collection of essays edited by Kees Waaldijk and Andrew Clapham, Homosexuality: A European Community Issue, (1993).

⁸⁶⁷It may be speculated that for this reason it is inclined to make bolder proposals than the other EU organs.

⁸⁶⁸Whose proposals possibly have to be politically attractive to be accepted by the Committee of Ministers before they end up as enforceable rules.

⁸⁶⁹W. R. Edeson and F. Wooldridge, "European Community Law and Fundamental Human Rights: Some Recent Decisions of the European Court and of National Courts", (1976) 1 LIEI 1, 52.

⁸⁷⁰O.J. 1977 C 103/1.

legally binding, this Declaration justified the presumption that the EU did not intend to infringe fundamental rights in its activities. The ECJ, perhaps spurred on by the anxieties of the German and Italian Constitutional Courts⁸⁷¹ succeeded in transplanting the rights guaranteed by the ECHR to EU law, especially at a time when the ECJ was trying to assert the supremacy of EU law over national law and constitutions. Nonetheless, in the case law of the ECJ the inflow of human rights law through the application of the Community legal order takes place only insofar as an EU right is concerned.⁸⁷² It could be speculated that the reasons for the ECJ's response could be that if it did not carry out this review those issues would go unchecked; if so, they would have to be reviewable in the member states; and as a consequence, a harmonious and uniform development would be harder to attain.

The case *Nold v. Commission*⁸⁷³ (hereafter *Nold*) was the first case in which the ECJ mentioned the ECHR by referring to it as a guideline to be used when confronted with a question of fundamental rights. Although *Nold* (and also *Rutili*⁸⁷⁴) set down insufficient⁸⁷⁵ criteria to determine the protection of basic rights, other cases followed where fundamental rights were considered an integral part of the general principles of EU law. In the *Stauder* case⁸⁷⁶, the ECJ persuaded the German courts to accept the supremacy of EU law even in the case of an

⁸⁷¹M. H. Mendelson, "The European Court of Justice and Human Rights", (1981) 1 YEL 125, 130. This author argued that unsurprisingly the unease with the state of affairs in this area of the law came from Germany and Italy; in those two countries rights are strongly entrenched constitutionally largely as a response to their fascist past.

⁸⁷²On the other hand, the possibility of incompatible interpretations of the ECHR by the ECJ and the Strasbourg Court cannot be ruled out. See: Nicholas Grief, "The Domestic Impact of the European Convention on Human Rights as Mediated through Community Law", [1991] PL 555.

⁸⁷³[1974] ECR 491.

⁸⁷⁴*Rutili v. Minister of the Interior*, [1975] ECR 1219.

⁸⁷⁵Andrew Z. Drzemczewski, "Fundamental Rights and the European Communities: Recent Developments", (1977) 2,1 HR Rev. 69, 80.

⁸⁷⁶[1969] ECR 419.

alleged conflict with the fundamental rights provisions of the German Constitution based on the existence of fundamental rights enshrined in EU law.

The ECJ issued other judgments in line with the ECHR but without acknowledging it as a source. For example, *Jean Noël Royer* was about a preliminary ruling under Article 177 EEC concerning the expulsion of a Frenchman with a criminal record from Belgium for failure to register with the Belgian authorities. The EU Commission thought the expulsion to be too extreme a measure and alluded to the ECJ having to pay heed to the ECHR as "an integral part of Community law"⁸⁷⁷ because it was an instrument ratified by all the member states. Although the ECJ reached a similar conclusion, it did not make a reference to the ECHR, and said "[...] the mere failure by a national of a Member State to complete the legal formalities of aliens does not justify a decision ordering expulsion."⁸⁷⁸ Another example is *Prais v. Council*⁸⁷⁹ where the plaintiff argued that her fundamental right to freedom of religion had been infringed by the date on which a written test for a post of translator with the EU was to take place. She invoked Article 9 ECHR. Although the ECJ dismissed the claim on the facts, it accepted the principle that the ECHR was to be taken into consideration by the Council.

In *Hauer v. Land Rheinland-Pfalz*⁸⁸⁰ a German court referred to the ECJ the question whether a Council regulation prohibiting the new planting of vines for a period of 3 years infringed the right to property guaranteed by Article 1 of Protocol 1. The ECJ observed that the Protocol allowed restrictions upon the use of

⁸⁷⁷[1976] ECR 497, 506-7.

⁸⁷⁸[1976] ECR 497, 513.

⁸⁷⁹[1976] ECR 1589.

⁸⁸⁰[1979] ECR 3727.

property provided they were deemed necessary for the general interest. Therefore, the applicant's right to property had not been infringed. This case also raised the problem of satisfying national sensitivities:

Human rights jurisprudence typically differs in the articulation of various balancing tests. The Hauer case offers a useful example: the right to free use of property is always balanced by societal concerns about the use of such property. In some cases the societal interest can be so overriding as to demand the actual confiscation of the property (with varying degrees of compensation and subject to principled decisions, proportionality and so on) as in the case of compulsory purchase for major social construction work. The collective "good" of a community is acknowledged, not simply as a legitimate curb on individual rights, but as a manifestation of a value which has comparable weight. In the final analysis taxation is a manifestation of this principle.⁸⁸¹

The interpretation of EU law in relation to human rights has generated some sensitive issues. For example, the member states' constitutional courts may be displaced when the ECJ checks the conformity of national provisions with EU law, and an ECJ judgment in this field may pre-empt the judgment of the European Court of Human Rights. In addition, before Maastricht, there was no specific catalogue of human rights to work from (at present, Article F (2) mentions the ECHR and therefore identifies the source of principles). The accession of the EU to the ECHR system, however, still remains as an outstanding issue.⁸⁸² Finally, some cases may arise within the field of EU law where the issues are non-economic, such as the right to life.⁸⁸³ In the case *Society for the Protection of Unborn Children Ireland Ltd. (S.P.U.C.) v. Stephen Grogan and others*⁸⁸⁴ a reference was made under Article

⁸⁸¹Joseph H. H. Weiler, op. cit., 1127.

⁸⁸²Andrew Clapham, "Human Rights and the European Community: A Critical Overview" in European Union: The Human Rights Challenge, vol. I, (1991), 30.

⁸⁸³Bruno De Witte, "Community Law and National Constitutional Values", (1991) 2 LIEI 1, 12.

⁸⁸⁴(1991) 3 CMLR 849.

177 EEC to the ECJ, who found that the Irish ban to distribute information on United Kingdom abortion clinics which had been applied to a group of students did not breach Article 59 EEC. Ireland could therefore bar the students from publishing the information and no issue of EU law arose.⁸⁸⁵ The ECJ recognised that it had no jurisdiction on national legislation outside the scope of EU law:

when required to give a preliminary ruling, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with fundamental rights - as laid down in particular in the European Convention - the observance of which the Court ensures.⁸⁸⁶

In addition, no questions of EU law were found to have arisen in another case, this time before the Irish Supreme Court. In *Attorney General v. X*⁸⁸⁷ the Supreme Court came very close to having to deal, *inter alia*, with the EU freedom to receive services in the other member states, but, as Chief Justice Finlay pointed out: "No decision on any question of European law is therefore necessary to enable the Court to give judgment." The reasons were put forward when he subsequently stated that:

Apart from the practical time scale difficulties of obtaining a ruling by way of a preliminary ruling from the Court of Justice of the European Communities, pursuant to Article 177 of the Treaty of Rome, in time for due resolution of the problems arising in this case, it is consistent with the jurisprudence of the Court that there being a ground on which the case can be decided without reference to European law, but under Irish law only that method should be employed.⁸⁸⁸

⁸⁸⁵See: Dena T. Sacco and Alexia Brown, "Regulation of Abortion in the European Community", (1992) 33 Harvard International Law Journal 291 and Brian Wilkinson, "Abortion, the Irish Constitution and the EEC", [1992] PL 20.

⁸⁸⁶(1991) 3 CMLR 849, para. 30.

⁸⁸⁷Lexis Transcript, 5 March 1992.

⁸⁸⁸Lexis Transcript, 5 March 1992, Finlay CJ.

The Supreme Court then overturned the injunction granted by a Dublin High Court on a 14-year-old rape victim who had been prohibited from seeking an abortion abroad.

Are the EU organs, institutions or agents bound by the ECHR?

Article F (2) of the Maastricht Treaty requires that the EU respect the human rights laid out in the ECHR and also, those common to the traditions of the member states, as general principles of EU law. Yet even before Maastricht the member states were individually liable under the ECHR for breaches they might have committed in the exercise of a discretion conferred or, even in pursuance of a duty imposed by EU law.⁸⁸⁹

Another question is whether an individual may lodge an application with the Human Rights Commission against an act adopted by the EU institutions in order to attribute responsibility to an EU institution for a breach of the ECHR under the ECHR machinery. The answer is in the negative, for the reason that it is not possible to institute proceedings before the Commission of Human Rights against the EU, its institutions or organs because they are not party to the ECHR. The European Commission of Human Rights rejected such type of application in the case *D. v. Belgium and the EC*⁸⁹⁰ concerning the European School in Brussels.

On the other hand, the protection of human rights within the EU system is subordinate to the existence an EU right or even perhaps to the ideas of EU integration. The ECJ stated:

⁸⁸⁹See: *Confédération Française Démocratique de Travail (CDFT)*, (1979) 2 CMLR 229.
⁸⁹⁰(1979) 2 CMLR 57.

In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community ...⁸⁹¹

This situation prompted some writers to argue that the EU does not take human rights seriously.⁸⁹² In *Rutili v. Minister of the Interior*⁸⁹³ for example, the ECJ was prepared to apply the standards of human rights to member states so long as it was a field governed by EU law. The case concerned a citizen of Italy engaged in political activities in France who was banned to live in certain *départements*. Such prohibitions could not be placed on a EU national unless the threat to French public policy was genuine and serious.

The ECJ human rights protection activity has always been subordinate to an EU connection because "in no case has it actually upheld claims based on this ground alone"⁸⁹⁴ and although the EU appeared to be bound by the substantive provisions of the ECHR (even before Maastricht) it is not bound by the Convention's procedural arrangements.⁸⁹⁵ The case *Hubert Wachauf v. Federal Republic of Germany*⁸⁹⁶ suggests that the exigencies of European integration may take precedence over the protection of fundamental rights. Bearing those

⁸⁹¹[1970] ECR 1125, 1134, para. 4.

⁸⁹²Aidan O'Neal and Jason Coppel, "Taking Rights Seriously?", EUI Working Paper No. 92/21, February, 1992, 3.

⁸⁹³[1975] ECR 1219, para. 32.

⁸⁹⁴M. H. Mendelson, *op. cit.*, 152.

⁸⁹⁵M. H. Mendelson, *op. cit.*, 158.

⁸⁹⁶[1989] ECR 2609. "The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights."

ideas in mind as a backdrop we should now embark on the comparative analysis of the case law in Strasbourg.

Part II

Interpretation by the ECJ: the comparative perspective

Human rights principles are applied, through EU law, to the EU legal order itself (unlike the Strasbourg system which is a benchmark for the practices of the member states) or to the member states in implementing EU measures or taking decisions affecting rights given or protected by EU law or in areas regulated by EU law (and here, much like the Strasbourg system). Human rights issues could also arise in the action of the member states as "trustees" for the EU.⁸⁹⁷

In the protection of human rights - unlike other areas of EU law - the ECJ resorts to a comparative survey similar to the Strasbourg technique. In other situations the ECJ may be unwilling to do so in order to avoid appearing to compromise on the issue of the supremacy of EU statutory law:

The technique, derived from comparative law, would be difficult for the Court of Justice of the Communities to adopt, save in the human rights field where the trend of its case-law suggests that the Court accepts the notion of human rights as set forth in the Convention. Community law is a specific law, distinct from the law of the member States, and it replaces and overrides national rules in certain spheres.⁸⁹⁸

⁸⁹⁷ John Temple Lang, "The Sphere in which Member States are obliged to comply with the General Principles of Law and Community Fundamental Right Principles", (1991) LIEI 23, 30.

⁸⁹⁸ W. J. Ganshof van der Meersch, "Reliance, in the Case-Law of the European Court of Human Rights, on the Domestic Law of the States", (1980) 1 Human Rights Law Journal 13, 25.

It has been argued that ECJ looks for a common ground not confined to the principles shared by all the member states, but rather, that it uses an "evaluative comparative law" which is "progressive" or "maximalist" and that it consists in "...surveying the laws of all Member States and then - in the light of the particular objectives and structure of the Community - selecting the 'best' or most suitable rules, even though they are to be found in only a minority of these systems."⁸⁹⁹ If legal principles are drawn from the EU member states, then they must be adapted to the structure and purposes of the EU: "They require, in one word, transplantation and acclimatization to a new environment. They cannot form an obstacle to the realization of the objectives of the Community."⁹⁰⁰ Other authors pointed out that "The Court should reject, and in fact has rejected, the notion and the language of trying to adopt the maximal standard prevailing among the Member States, not simply because it will in effect subject the Community to the constitutional dictates of the different Member States, but because it is an impossible exercise."⁹⁰¹ Indeed these apparently contradictory views are not in real opposition, but indicate that the human rights *jurisprudence* oscillates between the aspiration to unity and the acknowledgment of the pull of diversity.

Another similarity with the Strasbourg system is that the judges sitting in the ECJ bring a multiplicity of legal systems to the bench through their training and legal thinking. The presence of an A-G before the ECJ contributes also to the introduction of comparative elements in decision-making. Unlike the European Court

⁸⁹⁹M. H. Mendelson, *op. cit.*, 154.

⁹⁰⁰Ulrich Scheuner, "Fundamental Rights in European Community Law and in National Constitutional Law; Recent Decisions in Italy and the Federal Republic of Germany", (1975) 12 CML Rev . 171, 185.

⁹⁰¹Joseph H. H. Weiler, *op. cit.*, 1128.

of Human Rights, however, the ECJ system followed the French tradition of not allowing the publication of dissenting or concurring opinions.

The different legal systems and traditions come together in the process of decision-making. In order to organise the discussion, three areas of "contact" between systems and traditions have been identified, as follows: (a) institutions particular to a legal tradition; (b) the legal sources and their handling; and (c) the division of private and public law. Under these headings we will analyse the positions of the traditions and how, together with other forces, they shape the outcomes. This study is aimed at observing the influences of the traditions in the human rights case law of the ECJ. Most of the cases dealt with (although not all) will concern complaints filed against the EU institutions, therefore, the comparative problems discussed will be mainly those appearing when an individual or an undertaking need the protection of the ECHR against the EU organs.

The premise with which to start is the notion that the use of the comparative method by the ECJ can be made visible in the adjudication process. At some points of the analysis it will be necessary to step back to look at how the ECJ or the A-G went on to make observations on the adjudication methodology and see the influence of the legal traditions. A first comparative point stems from: "... the (relative) failure of the Treaties to make provision for human rights amounted to an ambiguity or lacuna which needed to be resolved or filled and, further, that resort to general principles of the Member States' municipal law was the appropriate means of making good that deficiency"⁹⁰² It may be a matter of opinion whether, under Articles 31-33 of the Vienna Convention on

⁹⁰²M. H. Mendelson, *op. cit.*, 154.

the Law of Treaties 1969, other courts would have held that they faced a gap which was to be filled or that it was necessary to look so far away from the Treaty to make up for the deficiency. Whatever the case, the comparative issue is that the ECJ followed an approach similar to the civilian conviction that a legal system is a whole from which solutions to cases can always be (syllogistically) deduced. As a continental court, the ECJ resorted to legal principles in the process of decision-making and created a body of *jurisprudential* EU human rights law from scratch. This case law is resorted to in subsequent cases as a *jurisprudence constante*.

(a) *Institutions particular to a legal tradition:*

In common law systems the role of procedural elements is more prominent than in civilian orders, to the extent that, when a decision is challenged before a court, "The question is also, and perhaps mainly, whether the decision has been arrived at in a legally proper way."⁹⁰³ The case *Transocean Marine Paint Association v. Commission*⁹⁰⁴ can provide some information about the extent of common law infiltration in the ECJ's approach to procedural law in the field of human rights protection. The facts of the case were as follows: in 1967 the EU Commission granted an exemption under Article 85 (3) EEC to the various enterprises forming the Transocean Marine Paint Association, subject to the condition that the Association keep the Commission informed, *inter alia*, of the composition of its membership. In December 1973, although the exemption was going to be renewed, an additional duty was placed on the Association, this time its members were also requested to

⁹⁰³T. Koopmans, "The Birth of European Law at the Crossroads of Legal Traditions", (1991) 39 AJCL 493, 503.

⁹⁰⁴[1974] ECR 1063, 1088-89.

keep the Commission informed of the existence of various types of links between companies inside and outside the Association. The applicants objected to the new burden on grounds that they had been denied an opportunity to put their views forward because neither the provision had been raised in the hearings before the EU Commission's nor had it been included in a "Notice of Objections." In the end, the ECJ struck down the challenged requirement although the rest of the decision was allowed to stand so that the Commission could reach a new decision on the point but only after hearing the members of the Association.⁹⁰⁵

In taking the decision, although no direct allusion to the principle *audi alteram partem* was made, the ECJ reached an interpretation of the applicable EU law on the analogy of the English law principle: "the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known."⁹⁰⁶ The legal position of the applicant association in relation to its procedural rights had been affected by the proceedings of the EU Commission, and the procedural defect could have had effects on its legal standing under substantive law.

The nationality of the A-G and the judges may be particularly important in the infiltration of principles to the EU legal order. In this case, Warner A-G thought that the situation was one where at least in English law, the procedural principle *audi alteram partem* would apply and in consequence, requested a comparative study of the laws of the other member states on their position in relation to the right to a hearing.

⁹⁰⁵A new decision was taken on October 23, 1975. OJ. 1975, L286/24.

⁹⁰⁶[1974] ECR 1063, 1080, para 15.

A principle may be common in various other member states in the same or different form. The requested comparative survey suggested that although the principle was not unknown in some civilian jurisdictions, it was at least (considerably) less developed than in the common law world. In France the principle was still in the course of development. In Germany, the Basic Law provided that the right to be heard applied only to the ordinary civil law courts, however, some administrative law cases appeared to have been resolved according to the principle. In Luxembourg, although the legislation was silent on this point, the Council of State had placed on the administration a duty to hear those concerned if a certain decision might affect proprietary interests. Ireland, Scotland and Denmark appeared to support the principle, however, neither Belgium, the Netherlands or Italy did. The use made of the principle in the case suggests, therefore, an approach closer to the common law.

From our comparative point of view there is another interesting aspect to this case. Although the judgment was reached on procedural grounds, using a rule borrowed from English law, the methodology applied by the ECJ was nevertheless civilian. The rule was treated as a principle "applied" to a situation and severed from supporting case law, as if it had been deduced from a rule laid down in a civilian code, so to speak.

Subsequent cases have used the principle. In the case of *Al-Jubail Fertilizer Company (SAMAD) and another v. E.C. Council (E.C. Commission intervening)*⁹⁰⁷ (hereafter *Al-*

⁹⁰⁷(1991) 3 CMLR 377. The new regime substituted a duty at 40 per cent in proportion to the value of the product for the old duty equal to the amount by which the import price was less than 133 ECUs per tonne. Two manufacturers of urea in Saudi Arabia were affected by the new regulation and appealed on grounds of inadequate statement of reasons, manifest errors of appraisal, errors of law resulting in distortion of the facts and denial of a fair hearing. See also: Jürgen Schwarze, European Administrative Law, (1992), 1222.

Jubail) the common law principle *audi alteram partem* was transplanted again into EU law with the result that a certain EU practice could not measure up to it. As a consequence, the ECJ annulled an article of a Regulation in respect to the applicants. The case of the example arose out of the enforcement of Regulation 3339/87 (hereafter, the derivative regulation) that made changes to the regime of anti-dumping duties on imports of urea from Saudi Arabia. The EU Council had adopted a basic Regulation 2176/84 (hereafter, the basic regulation) which was the basis for the adoption of anti-dumping regulations concerning particular goods. The issue of whether a fair hearing had been held became the centre of the case. The failure to disclose serious information rebutting the applicant's arguments was deemed decisive and therefore, determined the decision to annul Article 1 of the derivative regulation. The applicants could not voice their views on the matter.⁹⁰⁸ This position was supported by the consideration of the importance of the general EU principles of fundamental rights and the right to a fair hearing. The EU institutions had to be conscientious in providing information to enable the parties make their own opinion on the evidence available, and in this case:

[...] with regard to the right to a fair hearing, any action taken by the Community institutions must be all the more scrupulous in view of the fact that, as they stand at present, the rules in question do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems.⁹⁰⁹

The matter had been considered by Darmon A-G who pointed the way in which the case was to be decided. In his view, the administrative powers of the EU should be kept

⁹⁰⁸(1991) 3 CMLR 377, 414, para. 15.

⁹⁰⁹(1991) 3 CMLR 377, 414, para. 16.

under check by insisting on the need to grant the due process of law and the right to a hearing:

[...] there seems to be no doubt that the anti-dumping proceeding, although conducted by an administrative authority, must meet the needs of a 'fair hearing', which implies that an 'equality of arms' must prevail between the parties. Furthermore, observance of the principle of hearing arguments from both sides demands that the party or his representative have the opportunity of consulting and criticising the case documents, and in particular the evidence on which the decision was based.⁹¹⁰

Nonetheless, despite the fact that the case was decided on procedural grounds in a manner similar to the common law approach, there was no shift towards a common law methodology. In reaching the decision there was no substitution of a common law oriented inductive reasoning for a civilian-style deductive technique. Again, as in *Transocean*, the ECJ applied the English law rule as a legal principle according to a civilian method. The principle was deemed capable of standing alone and the ECJ did not embark on any elaborate case citations or distinctions or even English references to show the connection of the principle with previously decided cases. This is unsurprising because the ECJ tends to use its own *jurisprudence* in a civilian manner, and for that reason, "Although the quasi-normative decisions of the Court of Justice are described as judge-made law, that is not intended to mean that they have the effect as such of binding "precedents" in the Common law sense."⁹¹¹ Or, to put it in a rather disingenuous way, "Napoleon may perhaps be thought of as the principal, though involuntary, inspiration of the European Court."⁹¹²

⁹¹⁰(1991) 3 CMLR 377, 407.

⁹¹¹Jürgen Schwarze, op. cit., 63.

⁹¹²L. Neville Brown and J. F. Garner, French Administrative Law, (1983), 171.

In the case of *Josette Pecastaing v. the Belgian State*⁹¹³ the A-G suggested giving the case a treatment that took account of the the right to a hearing set down in the common law inspired Article 6 ECHR. Capotorti A-G made the point when considering the relevant provisions of Council Directive 64/221 EEC of February 24, 1964, (hereafter, the Directive), highlighting that "regard must be had for the basic principles of a fair hearing which are to be inferred from Article 6 of the European Convention." He supported his views with the case law of the European Commission and Court of Human Rights and on the basis of *Golder* concluded that there might be a right for the applicant to petition to a court although he recognised that the Strasbourg case law made the requirement of a personal appearance in civil proceedings dependent on the facts of the particular case.

This case concerned an Article 177 EEC reference to the ECJ of the question whether a French national, suspected prostitute, had the right to remain in Belgium pending her court action against the refusal of residence permit and deportation order. One of the issues was whether her expulsion before the hearing in the domestic court would devoid that right (enshrined in Article 6 ECHR) of any meaning in the case. The ECJ, however, interpreted the Directive to the effect that although the complainant was entitled to the same access to judicial remedies provided by the Belgian courts as any Belgian national, she could not insist on staying in Belgium pending her appeal. The right of access to the courts did not require personal presence, especially in view of the "margin of appreciation" implied in the "public policy" exception of Article 48 (3) EEC which was a recognised limitation to the principle of freedom of movement.⁹¹⁴ Incidentally, the ECJ did not think it necessary to include a rep-

⁹¹³(1980) 3 CMLR 685.

⁹¹⁴(1980) 3 CMLR 685, 708.

etition of its earlier case law to justify its resorting to the ECHR.

Let us look at other situations. One of these is how to protect an applicant against the risk of self-incrimination or breach of professional privilege⁹¹⁵ vis-a-vis the extensive powers of the EU Commission under competition law (which are in contrast to the restricted powers of investigation under anti-dumping law). Under competition law, it is a matter for the Commission's discretion when investigating an undertaking to choose between issuing a non-binding (informal) request or a compulsory order for submission to an investigation.⁹¹⁶ In *National Panasonic (UK) Ltd. v. Commission*⁹¹⁷ (hereafter *Panasonic*) the plaintiff company claimed that the Commission, by failing to communicate beforehand a decision ordering an investigation had infringed its fundamental rights protected under Article 8 ECHR, which the plaintiff considered applicable *mutatis mutandi* to legal persons. In the applicant company's view the EU Commission had disregarded the rights to notice, to be heard and to the privacy of the premises (allegedly) afforded by Article 8 ECHR.

Rights were not without restrictions. The outcome was, however, that the interference complained of was in accordance with the ECHR.⁹¹⁸ The protection of the public interest, individual businesses and consumers embodied in the EU rules of competition outbalanced Panasonic's rights "to respect to his private and family life, his home and his correspondence."⁹¹⁹ The common law inspired right to a fair hearing was used to measure the EU

⁹¹⁵Jürgen Schwarze, op. cit., 1221.

⁹¹⁶Jürgen Schwarze, op. cit., 1220.

⁹¹⁷[1980] ECR 2033.

⁹¹⁸This balance was similar to those the European Court of Human Rights is normally asked to perform.

⁹¹⁹Article 8 (1) ECHR.

Commission's practice but in the ECJ's view the searches without prior notification were covered by Article 8 (2) ECHR as being a limitation in accordance with the law and necessary in a democratic society:

[...] it is necessary to point out that Article 8 (2) of the European Convention, in so far as it applies to legal persons, whilst stating the principle that public authorities should not interfere with the exercise of the rights referred to in Article 8 (1), acknowledges that such interference is permissible to the extent to which it 'is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'⁹²⁰

The principle of protection against self incrimination was considered again in *Orkem v. Commission*.⁹²¹ The applicant company, accused of anti-competitive practices by the EU Commission, sought the annulment of a decision requiring certain answers that allegedly amounted to a confession to an infringement of the competition rules and as such, a self-incrimination in breach of Article 6 ECHR. The applicant had been asked questions seeking an acknowledgement of its participation in an agreement "whose object was to fix selling prices and which was capable of preventing or restricting competition, or to state that it intended to achieve that objective" or which was "intended to limit or control production or outlets or to share markets."⁹²²

In arriving at the conclusion to protect the applicant's rights, the ECJ followed an approach similar to the common law principle of no self-incrimination. The ECJ, respectful of the adversarial proceedings, observed that,

⁹²⁰[1980] ECR 3125, para 19.

⁹²¹[1989] ECR 3283.

⁹²²[1989] ECR 3283, 3352.

although "neither the wording of [Article 6 ECHR] nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself"⁹²³ the right of defence should be upheld even in preliminary inquiries and the EU Commission cannot be allowed to "undermine the rights of defence of the undertaking concerned"⁹²⁴ in the course of competition investigations. The ECJ responded to the need to curb the powers of the EU Commission in competition procedures by drawing the line where the Commission appeared to attempt a reversal of the onus of the proof by way of compelling Orkem to admit to an infringement which was incumbent upon the Commission to prove.

Darmon A-G pointed to the common law ancestry of the principle of no self-incrimination when he wrote, "reference is readily made to common-law tradition when speaking of the right not to give evidence against oneself."⁹²⁵ The principle is usually associated to common law procedural guarantees, and its goal is the achievement of "fair play" in adversarial proceedings. Practices leaning towards an inquisitorial model are difficult to assimilate under its requirements.

The comparative survey undertaken by the A-G showed, however, that although "there is common principle enshrining the right not to give evidence against oneself" in the legal systems of the member states, he had to admit that "the principle becomes progressively less common as one moves away from the area of what I shall call classic criminal procedure."⁹²⁶ In continental countries the "autonomy" of the different branches of the law extends to a lack of unity of method throughout the

⁹²³[1989] ECR 3283, 3350.

⁹²⁴[1989] ECR 3283, 3351.

⁹²⁵[1989] ECR 3283, 3328.

⁹²⁶[1989] ECR 3283, 3327.

legal system as implied in the phrase "common law".⁹²⁷ The ECJ blurred such civilian distinctions and transferred principles of protection from criminal to administrative law. As it also happened in other cases where a potentially grievous administrative action jeopardised human rights, the ECJ was willing to borrow from criminal law:

Thus the principles of *nulla poena sine lege*, *ne bis in idem*, *in dubio pro reo* and *nulla poena sine culpa* originally developed under criminal law can also be applied within administrative law, in particular where the issue, as in the case of the loss of a deposit in agricultural law or the imposition of fines in competition law, concerns not exactly criminal penalties but at least burdensome administrative measures.⁹²⁸

The ECJ put in evidence its own civilian "spirit" once more when it dealt with the rule as an isolated legal principle to be "applied" to a situation without elaborate case citations or distinctions or common law references. Principles are handled at a high level of abstraction, under the assumption that the legal system of the EU is a whole from which a solution to a case can always be found by deductive processes. This approach applies to principles with common law or civilian ancestry. Consider, for example, the substantive principle of proportionality taken from German law and applied to a human rights issue in *Internationale Handelgesellschaft*. Not surprisingly, it was treated in the same (civilian) way as the principle of no self-incrimination discussed above or that of *audi alteram partem*. The principle of proportionality (as well as other doctrines of public law) are transplanted by the ECJ into the legal systems of the member states where they did not exist originally.⁹²⁹ Rights are usually

⁹²⁷René David and Henry P.de Vries, op. cit., 44.

⁹²⁸Jürgen Schwarze, op. cit., 1456.

⁹²⁹Aidan O'Neal and Jason Coppel, op. cit., 46.

balanced against other sets of rights; in this case, economic freedom was limited in the common interest.

Internationale Handelgesellschaft arose under EU agricultural regulations on import and export permits for certain products. If an operation is not performed within a period of time, a trader would lose its monetary guarantee. The purpose of the system was to enable the EU to plan and regulate the volume of imports and exports of certain goods. In various cases of failure to import or export, however, the Chamber of the Administrative Court of Frankfurt had held the invalidity of the EU rules on forfeiture of the deposits for the reason that they were contrary to the German constitutional principle of proportionality. In 1970 that domestic court referred the case of *Internationale Handelsgesellschaft* to the ECJ for a preliminary ruling. The ECJ took the principle from the hands of the domestic court and held that the validity of an EU measure could not be affected by an alleged contravention of fundamental rights embodied in a member state Constitution or principles of national constitutional structure, and as a result, the challenged rules were not found to surpass the bounds of proportionality.

(b) The legal sources and their handling:

Two points need to be made on the study of sources. One aspect concerns focusing on the ECJ's borrowing common law principles by the adjudication process and whether that determined a shift in the hierarchy of sources as applied by the ECJ. The other point (the purpose of this sub-section (b)) is whether the member states can be treated equally as regards the survey of the laws of the member states with different constitutional traditions. The aim is to see whether the constitutional make-up of

the member states influences the selection, and also, whether different traditions can be assimilated by the ECJ.

In *Stauder v. Sozialamt (Social Welfare Office) der Stadt Ulm*⁹³⁰ the applicant, Mr. Stauder, complained that his right of privacy and personal dignity had been violated by one requirement of the Council Regulation which entitled him to receive inexpensive butter. He was required to disclose his identity to the person making the delivery in order to prove that he was on welfare assistance. The ECJ sympathised with his case and found a solution stating that, suitably interpreted, the Regulation did not demand nominative identification and that other methods of preventing abuse would be sufficient. The whole issue had arisen because the German translation of the Regulation was harsher than other official versions.

The ECJ found that fundamental rights were part of the unwritten law derived from the common traditions of the member states, "enshrined in the general principles of Community law and protected by the Court"⁹³¹ and transplanted them to its *jurisprudence*. The difficulty lay in the ECJ's lack of clarity in pointing out to the Constitutions of the member states as a source of law, a formula which made it difficult to assimilate the unwritten constitution of the United Kingdom, and also, the French constitutional text which does not make specific references to human rights protection.⁹³²

⁹³⁰[1969] ECR 419.

⁹³¹[1969] ECR 419, 425.

⁹³²In fact, as it was pointed out in Chapter 3 of this dissertation, in the UK where there was no catalogue of human rights, reference must be made to ordinary legislation and recognised legal principles and France, lies somewhere in between, civil and political freedoms are guaranteed by certain constitutional provisions and by legal principles.

We should turn our attention to another decision. In its judgment in *Nold* (2), the ECJ said that "fundamental rights form an integral part of the principles of law, the observance of which it ensures"⁹³³ and explained that in safeguarding those rights it was:

bound to draw inspiration from constitutional traditions common to the Member States, and [...] Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.⁹³⁴

The ECJ also referred to "fundamental rights recognized and protected by the Constitutions of those Member States." Not all the member states had written constitutions in the sense that the expression appeared to suggest. How could the different traditions be assimilated? The coupling of these two formulae was changed in the *Panasonic* case, where the ECJ reverted to the open formula, "the constitutional traditions common to the Member States." Although the main source for human rights is to be found in constitutional provisions, not all fundamental rights are expressed there, and even if the issue is thought of a mere semanticism, it is nevertheless very important for a court in the supranational position of the ECJ to pay attention to detail in order not to leave some member states unnecessarily out of the process of creation of European law.⁹³⁵ The reference to all member states indicates a reference to the British situation and those other countries where rights are not codified.⁹³⁶ The open formula was more in line with the recognition that "generalisations about 'written constitutions' or 'unwritten constitutions' are unfounded, because they

⁹³³[1974] ECR 491, 507.

⁹³⁴[1974] ECR 491, 507.

⁹³⁵M. H. Mendelson, op. cit., 149.

⁹³⁶Joseph H. H. Weiler, op. cit., 1130.

depend upon a distinction which is misleading and inexact"⁹³⁷ and as a result, allowed room for the assimilation of all the EU member states as possible donors. As the Commission Report pointed out, "many common features of principle contrast with deep-rooted differences in the manner in which these fundamental rights have been elaborated amongst the Member States."⁹³⁸

If we take a step back and look at the approach of the ECJ, more evidence on another comparative point can be gathered. Again, the ECJ when trying to find a common approach or European consensus from where to extract principles was following the civilian assumption that there is a coherent system of general rules derived from a few basic principles from which the solution to any given situation can be derived.

(c) The division of private and public law:

The dichotomy private versus public law is relevant before the ECJ. The public law and legal systems of France and Germany have supplied many general principles and ways of thought in public law for the EU legal order. For example, in *R v. Ministry of Agriculture, Fisheries and Food ex parte Fédération Européenne de la Santé Animale (FEDESA)*⁹³⁹, the Council Directive 88/146/EC banning certain substances having hormonal action for livestock farming was attacked on grounds, *inter alia*, that legislation should not be retroactive. The ECJ, following the civilian idea that each branch of the law has its own particular methodology, made a distinction between penal and non-penal provisions and established

⁹³⁷Colin R. Munro, Studies in Constitutional Law, (1987), 7.

⁹³⁸"The Protection of Fundamental Rights in the European Community", Commission report, Bulletin of the European Communities (1976) Supplement 5/76, page 52 et seq.

⁹³⁹(1991) 1 CMLR 507.

that the former may not have retroactive effect. Thus, the challenged Council Directive could not be construed as requiring the member states to adopt measures which violated that principle and the ECJ found that it would not sanction criminal proceedings instituted under national provisions adopted in implementation, and only on the basis, of the annulled directive. Outside criminal law, however, retrospectivity is exceptionally allowed although subject to the protection of the legitimate expectations of those concerned.⁹⁴⁰

The treatment of the legal point corresponds to the doctrine of legitimate expectations, which has French ancestry.⁹⁴¹ One cannot assume, however, that there are always unconditional civilian and common law positions on each issue of law. In 1991, when this case was decided, the House of Lords had already decided (in 1984) the case *Council of Civil Service Unions v. Minister for the Civil Service*⁹⁴² where this (civilian) doctrine had been accepted in English public law. Therefore this doctrine is not completely alien to the common law tradition of the United Kingdom. It has already been argued in this dissertation that the legal traditions are drawing closer in many areas, and under the increased contacts between them, some cases may be in contrast to changes taking place in their own legal systems of origin.⁹⁴³

⁹⁴⁰[1991] 1 CMLR 507, 537.

⁹⁴¹Jürgen Schwarze, op. cit., 1438.

⁹⁴²[1984] 3 All ER 935.

⁹⁴³A similar observation was made in Quebec family law cases concerning the custody of children heard by the Supreme Court of Canada. Some of the civilian judges sitting in the Supreme Court were prepared to decide against the natural parents of a child when it appeared to be in the child's interest his being left in a home other than that of his natural parents for a variety of reasons. The Quebec Civil Code (following the civilian tradition) stressed that a child remains under the authority of his parents until he comes of age, but legal changes as regards custody of children were taking place in the legal system of Quebec itself. See, for further details: Peter H. Russel, The Supreme Court of Canada as a Bilingual and Bicultural Institution, (1969), 186-7.

Take another example. *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*⁹⁴⁴ (hereafter *Johnston*) concerns the issue of the supremacy of EU law over national law. Directives in general obligate the member states to produce an end result. All authorities, included the courts of the member states for matters within their jurisdiction, are duty-bound to achieve the results envisaged by a Directive. The member states differ in what is considered to be a part of the state and therefore the tension between unity and diversity makes it difficult to assimilate different traditions in the fold of a *jurisprudence* which can be shared equally by all member states. In general, public law in the United Kingdom does not provide for appeals against a discretionary decision of a minister involving issues of national policy. *Johnston* dealt with the right to be heard on appeal against an administrative decision made by a minister. The applicant challenged the legality of the policy of not issuing firearms to female members of the R.U.C. under domestic law.⁹⁴⁵ The ECJ ruled that Article 6 of the Equal Treatment Directive had to be interpreted in the light of accepting judicial control as a reflection of a the general principle of law underlying the constitutional traditions common to the member states and which was also laid down in Articles 6 and 13 ECHR. For these reasons, a certificate issued by a Secretary of State in the United Kingdom could not be accepted as conclusive evidence that there was a justification for not treating men and women equally on grounds of national security or policy considerations.

The United Kingdom was bound to award judicial review in the field of EU law⁹⁴⁶ even if it was normally unavailable for cases outside that area of the law. The domestic

⁹⁴⁴(1986) 3 CMLR 240.

⁹⁴⁵Article 53 (2) of the Sex Discrimination (Northern Ireland) Order 1976.

⁹⁴⁶John Temple Lang, *op. cit.*, 27.

statute made to implement the Directive was held to be legally ineffectual because it did not comply with the requirements of Article 6 of the Equal Treatment Directive nor Articles 6 and 13 ECHR, by which everyone whose rights are violated is entitled to an effective remedy before a judicial body.

Conclusions

Lord Denning's play on words went "Just as in Rome, you should do as Rome does. So in the European Community, you should do as the European Court does."⁹⁴⁷ Then, what does the ECJ do in the area of human rights applied within the sphere of EU law? This chapter attempted an answer from the point of view of the uses and effects of the comparative method on a selected group of ECJ judgments dealing with human rights protection, where the application of the ECHR through EU law was studied from the viewpoint of the solutions and ways of thought related to the legal traditions.

Maastricht described human rights as general principles. It recognised statutorily what the ECJ had achieved by way of *jurisprudence* alone. Before Maastricht, however, the work of the ECJ in transplanting human rights to the EU legal order could have been comparable to the creation of French administrative law through the *jurisprudence* of the Council of State. Nonetheless, despite the recognition of fundamental rights, the cases have usually been resolved on the basis of EU law alone or the rights were limited in the EU interest. There is some truth in the criticisms voiced on the ECJ's "not taking rights seriously" on the basis of the apparent priority given to

⁹⁴⁷ *Buchanan & Co. v. Babco Forwarding & Shipping Ltd.*, [1977] QB 208, 214.

the needs of European integration over the protection of fundamental rights.

Almost unavoidably for a court in a multicultural setting, the comparative method resorted to by the ECJ in the field of human rights has enhanced its decision making capabilities by taking principles from both sides of the divide between the traditions. The main contribution of the common law has been in the field of procedural law, furnishing the ECJ with procedural elements pointing in the direction of (further) openness and fairness of the proceedings. The ECJ has struck down practices of EU organs or the member states that did not live up to those standards. That the common law made a contribution in the procedural field is hardly surprising, since it is the field where this tradition is at its strongest and besides, a similar kind of influence was experienced by other "mixed" legal systems. The ECJ is beginning to resemble more and more a court in a "mixed" jurisdiction, at least in the area of human rights, although not all traditions and differences are easy to assimilate. The ECJ, in the field of human rights protection, appeared transplanting outlooks and values from one tradition to the other by resorting to the comparative method.

The ECJ revealed its civilian ancestry, however, particularly when it sensed a loophole in human rights protection in the system of EU law and moved in to fill in the gap, probably guided by the civilian notion that a legal system is a whole from which principles can always be derived. The same situation happened when it applied common law inspired principles according to methods related to the civilian tradition. The common law contribution in the area of procedural law has nevertheless not involved a parallel change in the methodology of decision-making nor made exigencies

towards a radical departure from the (civilian) hierarchy of norms the ECJ tends to "apply" to each situation. The ECJ itself is a result of a "mix" of the legal traditions of the member states and its human rights *jurisprudence* is a blend of their outlooks and traditions. The tension between unity and diversity runs through the case law here also.

Conclusions

*Even the most realistic photograph
is not the same as the
subject...⁹⁴⁸*

This chapter closes the dissertation and poses again the question with which we began - "Is there a European law of human rights?" The answer is in the affirmative, but qualified. There is, of course, an apparent paradox in the picture that comes out of a first encounter with the stacks of human rights law reports in the Library. It makes us wonder whether there is indeed one European "common law" of human rights, created by the European Court of Human Rights, shared by all the member states of the Council of Europe and which is, more or less, contained in those books. But that first (misleading) impression soon vanishes in view of the diversity of systems and remedies in existence. The reality to be reckoned with is one where there is not one but a variety of overlapping systems of protection of civil liberties.

What is the effect on interpretation by judges and lawyers of such a multiplicity of systems? An environment permeated by legal diversity makes interpretation swing like a pendulum between unity and diversity. To understand the present situation we need to acknowledge that its hallmark is tension and discrepancy: there is pulling and ambivalence between the aspiration to uniformity, which is implied in the question of the title of this dissertation, and the acknowledgement of diversity, which is accepted in its subtitle. The purpose of this final chapter is therefore to delineate the factors already analysed to see their

⁹⁴⁸Ansel Adams, The Camera, (1980), 1.

various influences; the approach is synthetic rather than analytic.

This thesis gave an account of the correlation of the interpretation of the law of the ECHR with the Western legal traditions represented by the various legal systems that come together in Strasbourg. It concentrated on the "traditionally" different responses they give to legal problems and how those are accommodated in a "European" context. As Professor MacCormick has pointed out, there is a cluster of systems interacting and overlapping in the European environment; as such, this multiplicity points to a conception of the law which is diffuse and lacks a single origin.⁹⁴⁹ As regards human rights protection, in addition to the national law arrangements and approaches, there is the system of the United Nations and in Western Europe, the protection of rights by the EU system (although the latter will deal with human rights only as long as such issues touch upon questions of EU law).

The comparative method helped to make visible the effects of the multiplicity of the available systems on the interpretation of human rights law. On the basis of the theory of legal families, a first step in making sense out of this diversity was to group the legal systems of the member states in the two well-known categories: the civil law and the common law. Both traditions meet in Strasbourg and "mix" in the process of decision-making (despite the many differences separating them) in a situation sufficiently remarkable (because of those differences) to interest the comparatist.

The methodology for this study did not consist in the preparation of a list of (artificial) characteristics to

⁹⁴⁹Neil MacCormick, "Beyond the Sovereign State", (1993) 56 MLR 1, 8.

"oppose" the civil law to the common law; such an oversimplified and sweeping approach would have had little meaning. Rather, it involved looking for tendencies operating in the systems which can explain choices made or inclinations present in the style or the reasoning. The experience of mixed jurisdictions helped in the definition of the method of study and the comparison started on the foundation that the civil law and the common law still differ in their underlying assumptions. The comparative problems in the case law of the European Court were classified under the following labels: the general structure of the legal system (considering the legal sources and their handling and the cases where aspects of the legal system *per se* is affecting the human rights of the individuals), the procedural law and the rules of evidence.

On the other hand, the emphasis of this work on the comparative elements does not imply that those were understood as the only determinants of the result of a case nor that the comparative method captured all the aspects involved in the interpretation of the Convention law. Other elements influence the outcomes as well, such as more or less overtly recognised policy considerations, both in Strasbourg and in the member states, the use of the doctrine of the margin of appreciation or the periodic necessity to pay due respect to national characteristics, to name a few.

On several occasions the European Court appeared to try to assimilate the various legal systems in one *jurisprudence* which could be evenly shared by all, although in some cases this proved impossible. The construction of human rights law stands therefore at an interpretative cross-roads because the European Court, on the one hand, yields sometimes to the pragmatic need to make allowances for the different approaches of a variety

of legal systems, from which it also draws inspiration, but on the other, it seeks uniformity, which, in turn, sets its sights high towards the tantalising archetype of a single system of protection. Such a belief on the part of the Court is also a practical tool of interpretation because it gives a sense of direction to its work. The case law showed, however, that the pull towards uniformity is not sufficiently powerful to erase all the differences between the systems of protection of human rights or to neutralise their effect on interpretation.

Consider a representative group of cases which illustrate the tensions between the traditions in a microcosm. Under the title "The general structure of the legal system of the respondent member state", two aspects were observed. The first concerned the legal sources and their handling. This aspect was studied in the cases addressing the meaning of "law", *Sunday Times Case No. 1*⁹⁵⁰, *Kruslin v. France*⁹⁵¹ and *Huvig v. France*⁹⁵² where the Court managed to assimilate both traditions under the same line of *jurisprudence*. The other aspect concerned the situation where a particular feature of a legal system was affecting the human rights of the individuals and where the European Court had to dwell on detailed administrative aspects of the laws of the member states as a result of which it could not produce a *jurisprudence* capable of being evenly shared by both traditions. These cases dealt with the issue of Article 8 and 12 ECHR and the rights of transsexuals to the recognition of their "new" identity: *Rees v. United Kingdom*, *Cossey v. United Kingdom*⁹⁵³ and *B. v. France*.⁹⁵⁴ Under a second title, "The procedural law of the member states", some common law inspired "bench-marks" built in the ECHR were "applied"

⁹⁵⁰(1979-80) 2 EHRR 245.

⁹⁵¹(1990) 12 EHRR 547.

⁹⁵²(1990) 12 EHRR 528.

⁹⁵³(1991) 13 EHRR 622.

⁹⁵⁴(1993) 16 EHRR 1.

by a majority of civilian judges according to a civil law inspired procedure and method and, as a result, some civilian (or civil law based) institutions failed the test. For example, some domestic rules of evidence clashed with Article 6 ECHR. The inquisitorial underpinnings of the "*por reproducida*" procedure in Spain, in the case *Barberà, Messeguè and Jabardo v. Spain*⁹⁵⁵ did not meet the ECHR standards. The right to cross-examine witnesses guaranteed in Article 6 ECHR made the Court reject the system of witnesses *tout court*, typical of the continental procedure. The system, in both *Unterpentiger v. Austria*⁹⁵⁶ and *Kostovski v. The Netherlands*,⁹⁵⁷ failed the test. The importance of the appearances was discussed in *Borgers v. Belgium*⁹⁵⁸ which reversed the previous *Delcourt v. Belgium*⁹⁵⁹ on grounds that the institution of the *Ministère Public* did not appear sufficiently fair. Further, the inquisitorial assumptions behind the system of Austrian "*croquis*" which involved the submission by the *Procureur* of a proposal of a decision was also set aside on similar grounds in *Brandstetter v. Austria*.⁹⁶⁰ The civilian tendency of keeping one (original) copy of the accused's file, was discussed in *Toth v. Austria*⁹⁶¹ and was deemed not to fulfil the requirements of the ECHR. Finally, the Dutch "Crown Appeal" procedure before the Council of State, was addressed in *Bentham v. The Netherlands*⁹⁶² (and sidestepped in *Oerlemanns*⁹⁶³) where the Court insisted on the Convention requirements of due process and the institution was found wanting in this respect.

⁹⁵⁵(1988) 11 EHRR 360.

⁹⁵⁶(1991) 13 EHRR 175.

⁹⁵⁷(1990) 12 EHRR 434.

⁹⁵⁸(1993) 15 EHRR 92.

⁹⁵⁹(1979-80) 1 EHRR 355.

⁹⁶⁰(1993) 15 EHRR 378.

⁹⁶¹(1991) 14 EHRR 551.

⁹⁶²(1986) 8 EHRR 1.

⁹⁶³(42/1990/233/299).

Further clashes between the traditions were observable in cases dealing with the important differences between what is good administration in the different member states. The gulf between the civilian countries and the United Kingdom on the distinction between investigation by the police and that performed by the (continental) investigative judges had repercussions in Strasbourg. Specifically, the differences between the Court and the United Kingdom over judicial control in cases of pre-trial detention in a situation of emergency were discussed in *Brogan v. United Kingdom*⁹⁶⁴ with the result that the respondent government entered a notice of derogation.

In many instances, however, the Court was successful in "transplanting" standards from one tradition to the other through the "application" of the ECHR to a situation. As a result, it introduced further elements of due process and of the appearances of a fair trial (Article 6 ECHR) which are basic tenets of the common law, and insisted on the need for respect of the contents of Article 5 ECHR (which carries the common law model of the protection of personal liberty in its rather detailed requirements) in jurisdictions where those principles were absent or treated less emphatically. Although in some areas the common law and the civil law are gradually moving closer even in their methods and techniques - and the European Court's "sideways transplants" may contribute to this result in some measure - yet the point of complete assimilation has not been reached and, of course, it may never be reached.

More problematically, the study of these cases also revealed the effect of another "comparative" aspect: the human rights organs in Strasbourg are composed of people

⁹⁶⁴(1989) 11 EHRR 117.

who have been appointed from the various member states and their presence contributes to a measure of - perhaps subconscious - "transplantation" of legal thinking. The case law revealed the influence of the background and legal training of the judges of the European Court in decision-making. Although the judges exercise their initiative, carry out skilled improvisations on occasion and usually seem to work as a "team", they are at times reluctant to leave hold of the methods and techniques they learnt in their own legal systems. Writing in 1972 after Strasbourg ruled on the *Delcourt* case, K. Nadelmann⁹⁶⁵ said that the individual reputation and prestige of each of the judges could not make up for the risks involved in requesting them to decide issues of particularly local⁹⁶⁶ (i.e. national), and not general, law.⁹⁶⁷ The very diverse backgrounds of the judges and the fact that they did not sit together regularly enough added to the hazards, in his opinion. By reading the case law one can observe that the European judges are however very careful to demonstrate that they had understood the case at hand, perhaps because they are conscious of being a body of "outsiders" with no special knowledge of the internal law and practice of the various domestic legal systems.⁹⁶⁸ Some authors suggest that the varied backgrounds of the judges and the distance from the cases give them a more balanced and objective view of the issues.⁹⁶⁹

⁹⁶⁵K. Nadelmann, id., 514.

⁹⁶⁶In a conversation with Strasbourg Court judges from continental Europe: they spoke of the British legal system without making distinctions as to the different legal systems of the United Kingdom.

⁹⁶⁷The judges sitting at the European Court of Human Rights spend each year close to 135 days in Strasbourg and on preparatory work at home. Rolv Ryssdal, The future of the European Court of Human Rights, European Court of Human Rights: Report # ECOUR90296.AB (1990), p. 1.

⁹⁶⁸J. G. Merrills, op. cit, 29.

⁹⁶⁹Francis G. Jacobs, "The Convention and the English judge", in: F. Matscher and H. Petzold (eds.), Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda, (1988), 277.

The situation in Strasbourg is, in this respect, similar to the ECJ, because the judges bring to the bench the conceptual background and the instinctive reactions they have developed in the course of their law careers in their legal systems. "Almost subconsciously, therefore, comparative law must be influencing their interpretative function"⁹⁷⁰ and it is not surprising that the *jurisprudence* revealed that, through the agency of a diverse bench, the member states appear to have borrowed legal elements from one another in a movement of "sideways" transplantation of standards. Rudolph Bernhardt wrote appropriately that "(...) a comparison is guaranteed at least to some degree by the fact that human-rights organs are usually composed of lawyers from different States and different legal orders, and their experience and knowledge contribute to a measure of comparative analysis."⁹⁷¹ The various judges by the mere fact of working together at the European Court can draw the attention of their colleagues to at least some of the many procedures tenable in law. The same sort of opportunities for this form of comparative method were seen in the biculturalism of the Supreme Court of Canada by one of its justices:

Perhaps to one who has not had access to the conferences of the Court, it might be hard to realize the unique service rendered, in the course of the discussions, by the Judges raised in one or the other system of law endeavouring to secure from brother Judges explanations on the meaning and purport of some articles of the Quebec Civil Code, or likewise, of some precedents under the Common Law. When one has been accustomed to a particular aspect of his law, he is most apt to take for granted a particular interpretation, which, very often he has ceased to take the trouble of analyzing. But if he is asked to give some

⁹⁷⁰L. Neville Brown and Francis Jacobs, The Court of Justice of the European Communities, 3r. ed. (1989), 284.

⁹⁷¹Rudolph Bernhardt, "Thoughts on the interpretation of human rights treaties" in: F. Matscher and H. Petzold (eds.), Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda, (1988), 67.

explanation of it, then he is compelled to go deeper into the reason for his interpretation; and one cannot begin to appreciate to what extent and how much more thorough becomes his grasp of the intention of the legislator.⁹⁷²

The whole environment where the Convention operates is conducive to the engagement of the different legal traditions in a "dialectical relationship":

The Convention is drafted to control and influence the behaviour of states. Its notions are frequently wide and vague. They must be interpreted and clarified by the Convention organs. Those organs do not operate in a vacuum. Their members are influenced by their national context, their juridical background and many other factors. There is a constant meeting of different judicial traditions and standards in these organs.⁹⁷³

Perhaps it can be said that the Court finds a middle ground or compromise between the various systems when passing judgment and that the judges seem to have developed a shared "legal common sense" which enables them to work together. Further, they may also have become a team and give themselves to co-operation to a degree that differences are minimised. Similarly, in 1970, the ECJ judge Pierre Pescatore played down the importance of national habits and training of the (all civilian) judges sitting at the Luxembourg Court:

...in fact, it appears that in spite of the differences among the legal systems in the six countries, which should not be underrated, the factor of national tendencies has appeared to be practically of very little moment inside the Court. Individual factors such as specialization in different fields of law, as well as past professional experience tend to override influences coming from the distinctive features of the national legal background of each one. Attitudes are

⁹⁷²The Right Honourable Thibaudeau Rinfret, "Reminiscences from the Supreme Court of Canada", (1956) 3 McGill L. J. 1, 2.

⁹⁷³Jochen A. Frowein, "The European Convention on Human Rights as the Public Order of Europe", in: Andrew Clapham and Frank Emmert (eds.), Collected Courses of the Academy of European Law; 1990; The Protection of Human Rights in Europe, (1992), 305.

determined by the substance of the problems and not by national bias.⁹⁷⁴

In addition, this writer also noticed that the fact that most of the Strasbourg judges have to draft and discuss issues in a second or third language instead of their mother tongue acts as an equalising element that may help in their coming together.

What is the general perception of the Strasbourg officials? Their view seems to be that the diversity of origins of the judges does not affect the decision-making process of the Court adversely. A senior official at the Registry said that the main difference he had noticed was that some judges have a preference for oral trials over written procedure. Concerning the lawyers pleading before the Court, he said that he noticed only that academic lawyers seemed to have more difficulties with the procedures than their colleagues in practice.

To what extent, then, do the cases reviewed confirm those views? Do the multiplicity of legal orders from which the judges are drawn and also, their own legal knowledge, training and "lawyerly instincts", have an effect on the outcomes? The appointment of judges from many legal systems may offset the tendency to use domestic experience indiscriminately in dealing with "foreign" problems, which is one of the pitfalls of the comparative method in general.⁹⁷⁵ In some instances, as for example, in those dealing with the "autonomous" concepts, the case law showed that the judges cast aside habits acquired in the context of their national legal systems.⁹⁷⁶ On

⁹⁷⁴Pierre Pescatore, speech given at the Annual Banquet of the British Chamber of Commerce for Belgium and Luxembourg in Brussels, February 5, 1970.

⁹⁷⁵Rudolf B. Schlesinger, Hans W. Baade, Mirjan R. Damaska and Peter Herzog, Comparative Law: Cases - Text - Materials, (1988), 890.

⁹⁷⁶See, as regards the ECJ: T. Koopmans "The Birth of European Law at the Crossroads of Legal Traditions" (1991) *AJCL* 493, 499-500, a situation also observed by Peter de Cruz, A Modern Approach to Comparative Law, (1993), 17.

occasion, a similar observation was made as regards the way the cases were handled procedurally, as in *Fejde v. Sweden*⁹⁷⁷ where a body of mostly civilian judges distinguished it from *Ekbetani*⁹⁷⁸ in a manner common lawyers would be comfortable with.

Unfortunately, some other cases revealed that things do not always run smoothly. Unlike the ECJ, the Strasbourg system admits dissenting, partly dissenting or separate opinions, a situation which works to our advantage as it served the purpose of making visible such difficulties. As far back as 1968, in his dissent in *Wemhoff*⁹⁷⁹, Judge Zekia indirectly made the point that he might have decided according to common law concepts: "Coming from a country [Cyprus] where the system of common law obtains, I might unwittingly have been influenced by this system."⁹⁸⁰ Judge Martens' dissent in *Borgers v. Belgium*⁹⁸¹ highlighted the connection between the outcome of the case and the composition of the Court. The point of the Netherlands' judge was that, for those of his brethren unacquainted with the institution of the *Ministère Public*, *Borgers* (and also *Delcourt*) became a case concerning the fundamental principles of fair trial, while for those with a grasp of the *Ministère's* role, there was no threat to the due process of law in sight. The absence of *Ministère Public* in many of the judges' domestic jurisdictions and therefore, their unfamiliarity with the institution, might have led them to bring in the common law concept of the importance of the appearances to resolve the case:

... the Court is confronted in a double sense with various procedural systems: its members have been schooled in different procedural traditions and those

⁹⁷⁷(1994) 17 EHRR 14.

⁹⁷⁸(1991) 13 EHRR 504.

⁹⁷⁹(1978-1979) 1 EHRR 55.

⁹⁸⁰(1978-1979) 1 EHRR 55, Judge Zekia's dissenting opinion, para. 18.

⁹⁸¹(1993) 15 EHRR 92.

of the respondent State permeate the issues under Article 6 (1). It may be that those who are completely unfamiliar with a particular procedural institution will be more readily inclined to find it incompatible with the requirements of "fair trial" than those who form part of the same tradition ...

In *Borgers* the foundations on which the institution of the *Ministère Public* rested were part of the "logic" of an entire family of legal systems, and therefore, "... it is quite something for an international court to hold that the very proceedings (in criminal cases) before the highest court in one of the member States are "unfair" ..."⁹⁸²

Moreover, there are other cases where the judges are very reluctant to depart from their national legal training. The point is that lawyers, by practising (and having been educated) in a legal system develop a particular intuition of how legal institutions work according to that system.⁹⁸³ This wisdom, together with, perhaps, some acquired automatic reactions, makes them more efficient professionals in their own legal culture. The complication appears, however, when they go across the boundaries and their national legal outlook colours their views and moreover - to stretch the point slightly - one may wonder whether their national training leads them to misunderstand a "foreign" system.⁹⁸⁴ The influence of the judges' national perspectives is evident in the disagreements over the right to a public hearing in the

⁹⁸²(1993) 15 EHRR 92, Judge Martens' dissenting opinion, para .4.1.

⁹⁸³Rudolf B. Schlesinger et al., op. cit., 890.

⁹⁸⁴The issue of properly understanding a "foreign" legal system was raised in Canada as regards the Supreme Court's hearing appeals from the civilian system of Quebec. Unlike the situation in the European Court, in Canada common law judges are the majority of those sitting in the Supreme Court bench. Apparently, then, there was a risk that a majority of common law judges could reverse a decision of a Quebec court of appeal (which could have been reached unanimously) in issues governed by the civil law. This concern delayed the establishment of the Supreme Court until 1875, and led to the increase in the representation of judges drawn from Quebec from two to three in 1949 so when a civil law appeal was heard it was possible to convene a bench of five judges with a majority of civilians in order to protect the distinctiveness of Quebec. For further details see: Peter W. Hogg, *Constitutional Law of Canada*, 2nd.ed., (1985), 174 and 186.

case *Hennings v. Germany*.⁹⁸⁵ The main point of discrepancy between the majority and minority took place where the legal traditions offered different solutions. Judge Walsh, a common law practitioner and judge, stood against the majority as he held on to a "no exceptions" policy towards the right to a public hearing. In general, the common law tradition tends to place a special emphasis on the right to a hearing. As a consequence, this judge applied a different standard with the result that, in his opinion, Germany had violated Article 6 (1) ECHR. His position required the conclusion, which he did not deny, that although "the offences [were] classed as minor offences"⁹⁸⁶ a right to a hearing was to be granted.⁹⁸⁷ For the (civilian) majority, conversely, the case was merely an issue of procedural expediency where Germany was not in breach of the ECHR. This case concerned a Mr. Hennings who ran into problems on a train ride from Kufstein in Austria to Munich in Germany, had an angry exchange of words with a ticket collector and was finally fined. The Strasbourg Court determined that the authorities could not be held responsible for barring Mr. Hennings' access to a court in the circumstances of the case: the applicant had failed to take the necessary steps to ensure receipt of his mail (he had lost the key to his mailbox) and therefore, had missed the opportunity to file an objection or seek a reinstatement of the proceedings within the time-limits set down in German law.

All in all, the study of the *jurisprudence* outlined the (subconscious) comparative aspect which also shapes Convention interpretation and is brought "bottom-up" to

⁹⁸⁵(1993) 16 EHRR 83.

⁹⁸⁶(1993) 16 EHRR 83, Judge Walsh's dissenting opinion.

⁹⁸⁷This pattern of reasoning is repeated, on the issue of the waiver of the right to a hearing, in para. 2 of his dissenting opinion in *Schuler-Zgraggen v. Switzerland*, for example. (1993) 16 EHRR 405.

the European Court through the different backgrounds and traditions of its members.⁹⁸⁸

In addition, the comparative method performed a double task in this work. It was discussed as a tool of interpretation⁹⁸⁹ resorted to by the European Court in the process of decision-making and it was the approach used in the analysis in order to enable conclusions on the legal traditions shaping adjudication to be drawn. The comparative method used as a tool of research was, in this sense, "extracted" from the work of the Court itself.

The use of the comparative method by the European Court raised the issue of the legitimacy of a non-elected body grafting elements from another legal tradition into the member states' legal systems. Moreover, if we step back and look at the cases from a distance, they all bear the marks of a supranational judicial review of state behaviour. In this dissertation, the judicial review of member state conduct was equated to the work of a Constitutional Court in domestic law. Such evidence as was found suggested a transfer of the grounds for protection by a higher law in domestic law to a supranational level. The European Court has become a powerful force for change and innovation by putting pressure on the member states to align their practices with the ECHR. It adjudicates on issues concerning a supranational Bill of Rights written in open-ended

⁹⁸⁸Moreover, this "subconscious" influence on adjudication has been recognised as one of the very many indicators of the influence of the judges in shaping the law through interpretation. This "symptomatic" point has of course been made as regards the confirmation process of the candidates to the Supreme Court of the United States. This is partly because it is recognised that the nature of constitutional interpretation gives them considerable leeway to shape the law: "... the appointment of a Supreme Court justice and the confirmation process before the Senate must take account of the following truth: the nature of constitutional interpretation in the process of adjudication inevitably means that constitutional law is shaped, influenced, indeed made by those authorized to interpret. This is not a dirty little secret." (Harry W. Wellington, Interpreting the Constitution: The Supreme Court and the Process of Adjudication, (1990), 153.)

⁹⁸⁹Peter de Cruz, A Modern Approach to Comparative Law, (1993), 17.

language which was created to last for future generations, hence teleology is called in so as to provide the sort of continuing protection that a national Constitution provides for individual freedom. The European Court tends not to support finding the intention of the drafters as a method of interpretation.

In some measure, the ECHR can be depicted as the foundation of a *ius commune* based on the common culture and common interests shared by the member states. The protection of human rights is part of a wider framework of public law which is becoming increasingly European in the sense that the Convention system is striving to establish an *ordre public européen*,⁹⁹⁰ but it is conceded that it is still too early to speak in such terms. The issue of harmonisation, unification or approximation of law touches upon another dilemma that faces all the institutions looking for European union, i.e. the limits to be imposed on the autonomy of the member states.

The picture that emerged from this research was that of the "European" human rights system of the Council of Europe being a framework shared by many countries (and their legal systems), striving to accommodate plurality (with more or less success according to the case) but without replacing the domestic systems of protection. The pattern observed was that of the promotion of harmonisation and approximation but without eliminating the diversity of the legal systems of the member states, for the Court "is not moving towards a single 'European' system but it has put down markers for the States."⁹⁹¹ It is not necessary to harmonise all legislation if the goal is to "unite Europe." It is clear, then, that in such a task the issues of comparative law are central to the

⁹⁹⁰A. Z. Drzemczewski, European Human Rights Convention in Domestic Law: A Comparative Study, (1988), 19.

⁹⁹¹Colin Warbrick, "The European Convention on Human Rights", (1989) 9 YEL 385, 411.

process of interpreting and applying the law. The analysis of interpretation at the European Court, however, cannot be used to predict the outcome of individual cases for the reason that many factors (including extra-legal ones) operate in conjunction in the decision-making process in any tribunal. Consequently, it is argued that although interpretation of the rules does not entirely determine the outcomes, it certainly influences them as was shown in this work.

The European Court develops its *jurisprudence* between the pull towards a maximum and a minimum requirement of protection. A number of trends are at work: the idea of further European integration pitted against the concern for respecting national diversity as translated into the different answers given to a legal question by the systems of the member states; the wishes of the applicant versus those of the respondent government; a wide versus a narrow margin of appreciation, the latter depending, in turn, on an "acid test" also prepared by means of the comparative method (i.e. the existence or not of a "European consensus" on a certain matter). On some occasions, the European Court manages to assimilate the legal traditions under the umbrella of one "European" blended *jurisprudence*. At times, however, the Court appeared powerless to stop the member states from acting independently. The situation led us to conclude that, contradictory though it may seem, success in establishing a single system of human rights would involve a failure since heterogeneity is a source of inspiration for the Strasbourg system to operate. It was observed that a complex process of mutual transplantations of rules and legal methodology takes place between the legal traditions.

All that intricacy was put into manageable terms in this work by the metaphor of "transplants", comparable with a

photograph that "flattens" the three dimensions of the world into two. This dissertation proposed the adoption of the figure of "transplants of laws" as an aid to the study of human rights law. The metaphor (coined several years ago to explain situations in which laws were "borrowed" from a legal system and "incorporated" into another) simplifies, for the argument's sake, the complex interconnections and migratory routes of principles and underpinnings exchanged between the legal systems and the traditions. The metaphor was mixed with the idea of an "incoming tide" to imply that the relationship between overlapping legal systems is in constant movement. Unlike the experience of legal transplants in colonial Africa, where local inhabitants had (almost) no part in the process of "transplantation" of metropolitan law, in the European law of human rights there are two main groups of "transplants", "bottom-up" and "top-down."

The judgments of the European Court "export" standards to the constitutional orders of the member states in a "top-down" fashion. These standards can set limits to the power of governments in a sweeping range of issues: privacy, freedom of speech, immigration, minority rights, nationalisation of business, prevention of terrorism, clandestine surveillance by security forces, legal status of single parents and their children, child care, education, administrative complaints, trade union rights, prison rules and so on. In addition, the tests carried out in Strasbourg are grounded on concepts with distinct "autonomous" meanings, such as: "criminal charge", "mental patient", "conviction", "determination of his civil rights and obligations", "detention", "deprived of his liberty", "law", "judge or other officer authorised by law to exercise judicial power", "witness" and many others. Strasbourg does not understand the meaning of these expressions in terms of the domestic law of the member state in which they come in issue. In addition,

as is the case of a Constitution, these concepts are not historically specific conceptions, therefore the views of the drafters of the ECHR, even if known, will not necessarily determine interpretation.

Another form of "top-down" "transplantation" is by means of incorporating into domestic law the combination of rules and principles laid out in both statutory (the ECHR and the ratified Protocols), and case law form.

Nonetheless, in spite of non-incorporation, as soon as the right of individual petition is granted, the ECHR has proved capable of permeating some of its effects all the way down to domestic law, and to the minds of legal practitioners. A survey of national law reports showed that the attitudes of national courts in relation to the ECHR vary considerably from country to country and, similarly, their statute books revealed different positions for the ECHR in municipal law. Although the influence of the ECHR is not negligible even where it is not a part of national law, the infiltration proved nevertheless laborious. It was impossible to conclude with complete assurance that the ECHR had precedence over national law. On the other hand, the continuous reference to the Convention by the national courts appears to be the key to further harmonisation. At least national judges stopped to ponder how far the Strasbourg decisions were binding on them whenever the ECHR was pleaded by the complainants and their lawyers.

The research on the infiltration of the ECHR in national law brought together sources from three domestic countries. The situation and operation of the ECHR was different in each jurisdiction. To begin with, many (local) constitutional arguments served the purpose of holding back the penetration of the ECHR. In the United Kingdom many suggested the entrenchment of a Bill of Rights as a possible solution, although this option

clearly runs counter to the traditional constitutional argument of continuing parliamentary sovereignty. Across the English Channel, the doctrine of the inviolability of statutes influenced the French judiciary so much that as late as 1989 (when the Council of State passed judgment in *Nicolo*⁹⁹²) the three supreme courts were not agreed on the position of international law, and hence the ECHR, in municipal law. Nevertheless, after 1989 the French have the edge on the British (and the Italians) as there is more room for a "complicity" between Strasbourg and their national courts. In Italy, the weakness of Convention law, which is attributable to its vulnerability to posterior laws, makes the ECHR's position rather vacillating and, unsurprisingly, the difficulties appeared to have driven many citizens, as is the case of the United Kingdom, to look for redress in Strasbourg.

In taking cases to Strasbourg the applicants prompt further "top-down" transplantation of principles and standards to the member states. This transplantation is also "sideways" as seen in the case law discussed in this dissertation because the Court transfers values and principles from one legal tradition to the other through its comparative method.

Although the Strasbourg procedure itself appeared to be closer to the civilian tradition it did not prevent the operation of the common law inspired procedural devices of the ECHR or the use of legal thinking from the common law (e.g. the importance of the appearances, due process and so on). Likewise, the common law concepts of the ECHR, particularly in the area of procedural law have not involved a parallel change in the methodology of decision making nor made demands for a radical departure from the (civilian) hierarchy of norms applied by the European

⁹⁹²Roger Errera, "Recent Decisions of the French Conseil d'Etat", [1990] PL 134.

Court. Following the approach of the civilian tradition, the European Court handles its own case law as *jurisprudence constante* without the elaborate case citations or distinctions characteristic of the common law. A preference for a deductive approach to legal justification was detected in the layout of the judgments with two premises leading necessarily to a conclusion (*dispositif*). This style became all the more noticeable when confronted with those dissenting opinions written by common lawyers. The Court clings to a deductive model of argumentation that grounds justification on the Convention's rules instead of relying on substantive reasons elaborated by the judges and set down in the judgment itself. It is suggested that shifting the present position of the "centre of gravity" of justification towards the judgments could strengthen the authority of the European Court in all its endeavours.

Bearing witness to the complexity of the connections and to the fact that all the member states can ("democratically") participate in the creation of human rights law, there is also a "bottom-up" "transplantation" from the national legal systems to the European Court. We should not forget that the cases have already been argued in municipal law and the wide differences between the national legal systems have to be dealt with in Strasbourg - for example, a particular legal vocabulary, categories to organise and systematise rules, national techniques of interpretation and a legal system's structures, sources, hierarchies, courts, organisation of the legal profession and so on, which are different in each member state.⁹⁹³ The Court also borrows principles from the member states' legal orders namely, the principles of "proportionality", of the "accessibility

⁹⁹³E. Öřüćü, "An exercise on the internal logic of legal systems" (1987) 7 Legal Studies 310, 310.

and previsibility of the law" and of the "balance" of the interests involved.

The "European consensus" involves another type of "bottom-up" transplantation of standards, values, principles and legal thinking, which are "discovered" by means of the comparative method and incorporated into the process of decision-making. This "common law" results of a comparative survey from the laws of at least some of the member states. The European Court usually acknowledges it by resorting to generalisations such as "the law of the member States of the Council of Europe", "the law of the Contracting States" or some other similar wording to express the notion that the practices of (various) member states point in a certain direction which is then taken as one of the guidelines for deciding the case.

The figure of "transplants" also helps to see the ECHR itself as a piece of legislation which is not "tradition-neutral." The legal traditions left their marks in the drafting process as a result of which the legal text is rather like "patch-work design" because its standards came ("bottom-up") from both sides of the legal divide, although the actual combination of elements may have been chosen on political grounds. In the diplomatic negotiations leading to the drafting of the ECHR, the split between the civilian and common law traditions appeared as a struggle between two perspectives, which were given the names "enumeration theory" supported by the civilians and the "definition theory" favoured by the common lawyers. Although the research made us suggest that the division between the delegates was partly due to a struggle over imposing their own way of carrying out legal drafting, it was conceded that their positions may have hidden other grounds for opposing the suggestions of their colleagues but, for diplomatic reasons, they were

unwilling to voice as such. Unsurprisingly, the effect of this, as seen in the *jurisprudence*, was that difficulties were observed in the "application" of (some) principles of the ECHR to cases framed and argued in a legal tradition with underpinnings "alien" to those of particular articles of the Convention.

The European law of human rights was also "transplanted" to the system of the EU. Parallels were seen between both systems; their similarities range from the forms of penetration of the "European" law in the member states, to the (civilian) style of the decisions as a logical (and arguably non-political) conclusion of the "application" of the law to a situation, the comparative survey of the laws of the member states (in the field of human rights) or to the borrowing of principles from domestic law for use at the European level. Both systems are clearly a meeting-point of several legal orders.

There are also important differences. The tools for harmonisation and control of outcomes are in law much weaker in Strasbourg than in the EU. There is no counterpart to Article 177 EEC in Convention law. The remedies to protect human rights were still primarily determined by national law and the Strasbourg institutions suffer from a (relative) lack of power to control the outcomes. The Strasbourg Court's jurisdiction extends to a "declaration" of the non-fulfilment of Convention obligations, but unlike national courts the system depends on the willingness of the member states to co-operate. The obligations Strasbourg imposes on the member states when passing judgment are only binding in international law and there is no "direct effect" or harmonisation by directive in the EU sense of the term. In addition, the cases reviewed confirmed that the protection of human rights in the context of EU law

is subservient to the existence of an EU right or even to the ideas of EU integration.

Looking back on the entire work, the interpretation of ECHR law was examined in relative isolation from other factors (e.g. political or social considerations and other extra-legal factors) and the work concentrated on whether a more effective interpretation of the law of human rights, which is taking shape in Europe, can improve the protection of rights and freedoms. The availability of a legal bench-mark against which national practices can be measured (and then, if necessary, modified) in a context of further control over state action is of substantial importance. It was conceded that the present study was grounded on a few assumptions concerning tendencies operating in (Western) Europe. First, the general readiness of the member states to conform to the rule of law and to honour (albeit reluctantly sometimes) Strasbourg findings. Second, the debate over the universality or not of human rights standards did not appear in Europe with the same paralysing intensity as in the United Nations. Third, all the (Western) European countries share notions of justice and individual freedom. As a consequence, these preconditions facilitate the ECHR system to improve the available protection in the "more homogeneous" (than the world at large) European context.

In the sphere of interpretation of human rights law, can the ambivalence between a maximum and a minimum of protection be somehow resolved? It is suggested that the tension between unity and diversity is an ongoing struggle which does not need to be resolved to achieve sustained improvements in the defence of human rights. There is no one system of protection of human rights but several. The protection of rights takes place in an environment where different systems, traditions,

standards and principles overlap. The *jurisprudence* of the European Court cannot be shared as yet on an equal basis by all the member states all the time. Strasbourg acts as a culture broker which seeks the convergence of all the systems of protection. The safeguard lies in keeping up the work in that direction without interruptions but not in achieving an ultimate synthesis. The situation is to a degree comparable to linking together the exchange rates of a group of countries in order to make their currencies operate within progressively tighter parities. Benefits can be derived from the operation of the system independently of the achievement of the final goal of monetary union. Unlike the human rights protection systems, however, a full monetary union in the EU is seen as a desirable and attainable goal (at least by some).

What is at stake, then, in the final assessment? It is the protection of the rights of the individual vis-a-vis the state. The Strasbourg system brings substantive rights and also, principles such as fairness and openness in the procedures - already a part of most of the laws of the member states - to a very concrete and practical operational level. On the other hand, Strasbourg still carries with it elements of international law: there are "opt-outs" for the governments that rely on policy issues, such as derogations, a wide margin of appreciation on some questions and also the possibility for the government to invoke the defence of the reason of state. Another drawback is its complaint-based character which requires perseverance to pursue the case over a long space of time. Nonetheless, the litigants who instruct their lawyers to take their cases to a supranational European tribunal for redress see another chance open to them beyond the "sovereign" state. The "European" option offers them another avenue to challenge

their governments and also, the possibility of obtaining a better balance of the issues involved in their cases.

The thesis advocated here suggests that the use of the comparative method can contribute to the enhancement of the effectiveness of the methodology of interpretation. The European Court can make use of its comparative law edge - derived from its situation and also, diverse membership - to make available more legal devices for protection. The evolving common standards can upgrade the protection through a continuing interpretation of the law. A further implication of the thesis is that it can help to create a common system of European public law where all member states could share a *jurisprudence* on an equal basis. Although it is beyond the goals of this dissertation to address the reforms to the structure of the system recently agreed upon, the research suggests that it makes sense to give the system further harmonising effectiveness in order to mix the outlooks of both legal traditions and offer more options of protection through a shared *jurisprudence*. A permanent Court may increase the collegiality of the panel and encourage the cross-system dialogue of the judges. In general, the consequences of not using the comparative method effectively may leave individuals unprotected and without access to justice. An improved method of interpretation is therefore an important step in the direction of standing up for the protection of human rights and dignity.

To close, a word on this writer in relation to the topic and the comparative method. Having been brought up in South America, he has tried to use his "western but non-European" point of view to see all of Western Europe as a totality, a circumstance which, it is hoped, indirectly helped to place all legal systems studied on an equivalent basis for analysis. Perhaps this situation

has minimised the imbalances that too much reliance on one's own legal system of training may produce in any piece of comparative work.

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